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No. 79-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

COMMITTEE TO ELECT LYNDON LAROUCHE, LYNDON LAROUCHE, JR. and LEROY B. JONES,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Committee to Elect Lyndon LaRouche, the 1976 principal campaign committee of Lyndon LaRouche, Lyndon LaRouche, and Leroy B. Jones pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on August 23, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals has not yet been reported and is set forth, with the original pagination, in the Appendix, beginning at page 28a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1979. This petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

Did the Court below err in sustaining an FEC decision to deny Petitioner Presidential Primary Matching Funds, when:

1. the Court below found that the FEC had no legal basis for withholding funds during a three-month period in which the FEC labored to develop such a basis;
2. the reasons eventually relied upon by the FEC for denying funds included coerced statements obtained in violation of the First, Fourth, Fifth and Sixth Amendments to the U.S. Constitution;
3. CTEL was not accorded any form of notice whatsoever of the adjudicative procedures by which the FEC denied funds;

4. CTEL was denied any opportunity whatsoever to participate in, make submissions to, or in any way present its case at the adjudicative hearing at which the FEC denied CTEL matching funds;
5. the entire FEC procedure was motivated by political animus and a desire to inflict punishment upon CTEL, and when the Court below then refused to hear any presentation on this issue?

CONSTITUTIONAL PROVISIONS

The following provisions of the United States Constitution are relevant to the questions presented.

ARTICLE III
Section 2

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State; claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT I

Congress shall make no law respecting an establishment of religion or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken away for public use, without just compensation.

PROVISIONS OF THE UNITED STATES CODE

The following provisions of the United States Code are relevant to the questions presented and are set forth at length in Appendix A: 2 U.S.C. 437(d), 2 U.S.C. 438 (a)8 and 9, 5 U.S.C. Section 555, 26 U.S.C. 9033 (a) and (b), 26 U.S.C. 9036 (a), 2 U.S.C. 9038 (a) and (b) and 26 U.S.C. 9041(a).

STATEMENT OF THE CASE

This is a Petition for Certiorari, taken from an Opinion and Order of the United States Circuit Court of Appeals for the District of Columbia, dated August 23, 1979, affirming the administrative decision of the Federal Election Commission ("FEC") to deny the Committee to

Elect Lyndon LaRouche ("CTEL") certification of eligibility for the payment of Presidential primary campaign matching funds.

Petitioner CTEL is the principal campaign committee organized in October, 1975 to support the campaign of Lyndon LaRouche for the 1976 Presidential nomination of the U.S. Labor Party. Petitioner Lyndon LaRouche is an individual who, in 1976 sought and won the Presidential nomination of the U.S. Labor Party. Petitioner Leroy Jones is an individual supporter of and contributor to CTEL and the 1976 LaRouche Presidential campaign. The Respondent is the Federal Election Commission.

On October 14, 1976, CTEL notified the FEC that it had qualified for Presidential primary matching funds pursuant to 26 U.S.C. 9033(a) and (b). Fifteen other candidates, all from the Democratic or Republican parties had also applied, during the 1976 primary campaign, for matching funds. In each of those cases, the FEC followed an unvarying procedure—processing their claim expeditiously, and often disbursing funds without awaiting even *prima facie* substantiation of contributions. Certainly no candidate was subjected to a timeless and searching audit of each and every contribution and expense prior to being certified by the FEC to receive funds. However, candidate LaRouche, the candidate of a nonmajor party (and the only such candidate to have reached the matching funds threshold) was treated quite differently by the FEC and its staff.

LaRouche submitted to the FEC on October 14, 1976 the three written arguments required under 26 U.S.C. 9033(a) and the four certifications required under 26 U.S.C. 9033(b).

On October 21, 1976, the FEC requested information from CTEL concerning the nominating procedures of the U.S. Labor Party, questioning whether LaRouche was a *bona fide* primary candidate. CTEL replied to those queries by October 23, 1976, and on October 27, 1976 submitted a computer print-out listing all of its contributors and confirming that it had reached the matching payment

threshold requirements. The FEC staff, apparently satisfied with the submission, assured CTEL that the submission would be placed on the agenda of the FEC meeting scheduled for November 4, 1976 (*after* the general election, and after any disbursement would have allowed LaRouche to free himself of primary campaign debts and undertake vigorous campaigning for the general election). (See Appendix, pages 69a-73a.)

As a result of the November 4 FEC meeting, CTEL was informed that the FEC would initiate a field audit of CTEL expenses prior to disbursing matching funds. A team of FEC auditors then spent some days in early and mid-November in CTEL's offices examining the campaign's books and records.

Their conclusions were presented to the FEC almost *one and a half months later*, in a December 27 memorandum which raised entirely new questions. In that memorandum, the auditors recommended expanding the audit to examine the books and records of CTEL's major vendors and to directly contact contributors to verify contributions. (See Appendix, p. 74a.)

The companion Petition for Certiorari, *Jones v FEC*, well demonstrates the state of mind and intentions of the FEC when it proposed and approved, without any vote, the contacting of CTEL contributors. Three months of investigation had produced nothing more than a series of idle speculations on the part of the FEC staff (see Appendix, pages 74a-75a). Clearly the contributor contacts were made in hopes of "developing a case" for nonpayment of the long-delayed funds.

After this final "investigative" step, again a procedure reserved solely for LaRouche and his contributors, the staff submitted their final recommendation—urging that, on the basis of coerced denials of contributions from three contributors, the FEC should rule that LaRouche had not met the threshold requirements. The FEC then voted on February 10, 1977 that LaRouche was not eligible for matching funds.

A petition for review was filed with the United States

Court of Appeals for the District of Columbia Circuit. In view of the long drawn-out investigative procedure, culminating in an *in camera* and *ex parte* decision to deny matching funds, and the refusal of the FEC to permit CTEL or LaRouche any opportunity whatsoever to controvert the staff's findings, or even to know the content of and nature of the staff's findings, Petitioners also moved before the Circuit Court of Appeals for extraordinary discovery. This motion the court denied.

On August 23, 1979 the U.S. Court of Appeals, while admitting that LaRouche was afforded unique and illegal treatment (Slip Opinion at pages 21-26), affirmed the FEC decision.

ARGUMENT

If the companion Petition for Certiorari of *Jones v FEC* presents the question of whether a federal agency may constitute itself into a secret police force to inflict terror upon unsuspecting citizens, the case at bar raises the question of whether a rogue agency may assert itself as above the law entirely. In the case at bar, this Court must decide whether it was permissible for the FEC to constitute itself into a Court of Star Chamber, use inquisitorial tactics to deny its disfavored political candidates, *ex parte*, their rights under law, and, equally abhorrent, employ inventive and dilatory "investigative" tactics to postpone a decision while manufacturing the pretenses for the ultimate denial.

In 1976, many candidates from the Republican and Democratic parties applied for primary matching funds pursuant to 26 U.S.C. 9033(a) and (b) (the Act). In every case, without exception, the FEC processed the applicant's claim, and, often without awaiting even *prima facie* substantiation, certified the applicant to the Secretary of the Treasury for the disbursement of funds on the basis of notice alone from the applicant. No pre-disbursement audit was ever attempted.

There was, however, one unexpected guest at this feast

of tax-supported largesse. Lyndon LaRouche, a candidate for the nomination of the U.S. Labor Party, raised the required amount of funds, in the proper distribution, to qualify for matching funds. The Republicans and Democrats who comprised the Commission were unhappy with this third party intrusion. The proper order of things was upset. The FEC therefore devised a new and unique series of procedures for the LaRouche application, which were applied to that application alone.

The Act contemplated the universal use of the procedure which was in fact employed for all other candidates but LaRouche. Having expended funds in order to gain the nomination, a candidate plainly needs matching funds as soon as possible in order effectively to campaign. Although this need was most acute in Mr. LaRouche's case, since his campaign period after application was the shortest of all candidates, the FEC decided on a pre-disbursement investigation of no one but LaRouche.

The FEC then delayed LaRouche's application for three months while deciding whether it approved of the U.S. Labor Party's primary procedure. This was plainly in violation of the law. 26 U.S.C. 9033(a). More, the FEC then commenced an outrageous and unconstitutional campaign of terror and intimidation against unwary contributors to the LaRouche campaign. The Court below found this "investigation" to have given rise to substantial constitutional questions. See *Jones v FEC*, D.C. Cir. No. 77-2093 (1979), Slip Opinion.

THE PROCEDURE FOLLOWED BY THE FEC DENIED LAROUCHE HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

Many subtle distinctions have been drawn in the area of due process. In a final determination by an agency of the government which deprives a specific individual of a specific valuable benefit, to which he is *prima facie* entitled, however, one could reasonably expect that the procedure accorded him would be grounded in the American

concept of fair play. To this end certain irreducible minima have been found necessary. These principles have become, as the words "due process" originally signified, "the law of the land" *Murray's Lessee v Hoboken* 18 How 272 (1856). Whatever the exact demarcation of the elements of due process, they include, as a core minimum, the right to present one's side of the story (preferably by counsel) before the deprivation is visited upon one. See *Hannah v Larche* 363 US 420 (1963).

In the case at bar, both the FEC, and the Court below, made much of the "suspicious" pattern of contributions, and the supposed shortfall in contributions. See Slip Opinion at page 9, footnote 7, and page 11, footnote 9. At no time was LaRouche ever permitted to rebut this "showing". The Court below stated in a forthright manner that the facts before the FEC did not disqualify LaRouche. They merely "raised substantial questions," (Slip Opinion at page 9) or made up "information indicating" LaRouche's ineligibility (Slip Opinion at page 11). Moreover, these "facts" were *only* developed by the FEC for the purpose of litigation, *after* it had finally determined to deny LaRouche's application. See *infra*. Nonetheless, without any notice to LaRouche, without any opportunity, whether face to face or otherwise, to rebut, without any disclosure to LaRouche as the pendency of the determination, the FEC issued a final, adverse verdict. Slip Opinion at page 12. And this procedure, shrouded in night and fog, was, incredibly, upheld by the Court below.

Had CTEL been permitted to appear, or make a submission, the questions raised by the FEC would easily have been answered. For instance, the sequential money orders submitted by CTEL workers, about which both the FEC and the Court below make so much, are anything but extraordinary. When the Labor Party convention approached, CTEL supporters from across the country gathered in New York to push their candidate and make a final push for matching funds. All those who had not exhausted their legal limit on contributions went to the banks *en masse* to contribute. In this world of telethons,

rallies, mass mailings and benefits, this is as usual as a "get out the vote" campaign. Yet, CTEL was never even informed that the FEC planned to manufacture an "irregularity" from this activity. The Court below accepted this shocking secret decision-making procedure.

At least as offensive to both logic and the sense of decency and fair play is the Court's bland acceptance of the claimed "shortfalls" (Slip Opinion at page 11, footnote 9 and page 31) in meeting matching fund threshold criteria. In the accompanying case, *Jones v FEC*, the Court below partially reversed Summary Judgment for the defendant FEC et al., ruling that there were properly alleged violations of Constitutional rights in the FEC's unannounced, threatening "visits" to individual CTEL contributors. Even within the over-confined constitutional protections accorded the contributors by the Court below, is it not offensive to reason to refuse to recognize that many a person, faced with threats of jail emanating from the intimidating presence of unannounced surprise visitors, might deny contributions actually made? Such denial, under threat, is not foreign to the noblest minds. See *Matthew*, chapter 26, verses 33-75. Although one of the disciples of Christ was moved by coercive circumstances to deny his Lord "three times ere the cock crew," the Court reaches the incredible conclusion that despite *acknowledged* violations of the law, "we do not believe that our holding in No. 77-2093 [*Jones v FEC*] renders suspect the reliability of the results of the field interviews." Slip Opinion at page 31, footnote 23. To a court at all sensitive to the constitutional implications of sudden, Gestapo-style political interrogations of private citizens, as the Court below was not, the conduct underlying the companion *Jones* case would have served as an alarm. The Court below committed as plain an error in accepting the unlawfully extorted conclusions of non-contribution as truthful, as would a court in predicating a criminal conviction upon a confession induced by threats. It is not merely that a technical violation of, respectively, the FEC's governing law, or the standards of *Miranda v*

Arizona, 384 US 436 (1966) are committed (and the Court below concedes that the FEC's actions were *ultra vires*, Slip Opinion at page 28) but that the FEC's violations of law were so *calculated* as to make the denials of contributions inherently non-believable.

> A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated methods of persuasion.
>
> *Blackburn v Alabama*, 361 US 199 (1960).

In fact, Petitioners urged the FEC on two separate occasions to conduct their interviews circumspectly with some guarantees of due process. The FEC did not. Petitioners then communicated to the FEC their doubts about the validity of the interviews in view of the tactics of harassment and intimidation employed. (See Appendix, page 80a.)

See *Miranda v. Arizona*, *supra*. When the method employed against Petitioner Jones in the companion case, which methods sent him to the hospital, were leveled against one of lesser will or "gumption," no doubt the eager minions of the FEC could have extracted any statement they desired. In the area of political allegiance, of all areas, is it possible that such extracted statements will pass before the courts as true coin? If so, then it will not be long before the party that controls the FEC will be well entrenched against all comers. At that time, the conditions first warned of in *Buckley v. Valeo*, 424 US 1 (1976), will have come to pass.

THE FEC DENIED CTEL EQUAL PROTECTION OF THE LAW

The Court below conceded that the FEC treated CTEL differently. It is no denial of equal protection to treat different parties differently if the basis for classification is rational and not constitutionally impermissable. But

LaRouche, a citizen seeking the Presidential nomination of the party of his choice, was in all legally cognizable ways similar to all other applicants for FEC primary matching funds. Yet he was treated differently. The Court below suggests several reasons. The only one which is proper—the appearance of facial irregularities indicative of fraud—is concededly inapplicable to the case at bar.

> Accordingly, because the information on hand revealed no patent irregularities, the Commission was not warranted in conducting an investigation beyond the face of LaRouche's threshold submission.
>
> Slip Opinion at page 28.

The FEC did so nevertheless. The reasons, however they are dressed up in terms of CTEL's only exceeding the statutory minimum by a few dollars, or a fear of "frivolous candidates" (Slip Opinion at page 15), in fact shine through: the FEC did not intend that an American citizen not belonging to one of the two parties whose hands controlled the FEC's purse strings was going to benefit from legislation carefully engineered (in fact, originally *too* carefully engineered, see *Buckley v Valeo*, *supra* to benefit themselves alone.

Petitioners are not making merely an exclusionary claim—arguing that since the means were improper, the evidence so gathered may not be considered. The means most definitely were not only improper but more importantly extortionate, because they were sufficiently terrifying to extract statements which simply were not true. If this unlawful and discriminatory conduct passes constitutional muster, then the Constitution is reduced to the indignity of a shell game. If these "confessions" extracted by investigative methods more suited to employment by the Spanish Inquisition, pass as uncontroverted evidence, then equal protection and due process have lost all meaning. Thus, the Court below plainly erred in acknowledging the denial of equal protection and due process, and then providing it with the imprimatur of non-prejudicial or

harmless error. (See Slip Opinion at page 29.) The FEC is entitled to make no distinctions on the basis of membership or non-membership in a party, or possession of beliefs of which it approves or disapproves. Such discrimination is in no way similar to economic regulation and is thoroughly suspect. *Department of Agriculture v Moreno*, 413 US 528 (1973).

The Fifth Amendment imposes upon the federal government and its agencies the same obligations imposed on the States by the Fourteenth Amendment: according equal protection and due process to its subjects. Cf. *Yick Wo v. Hopkins*, 118 US 356 (1886), and cases collected in *Johnson v. Robinson*, 415 US 361, 364 n.4 (1974). The FEC denied CTEL *both* due process and equal protection. The minimum standard of due process would be to permit CTEL to rebut the claims of the FEC that it had not qualified for matching funds. As was stated in *Hannah v. Larche*, 363 US 420 (1960) in distinguishing investigative from adjudicative proceedings:

> Due process is an elusive concept. Its exact boundaries are indefinable, and its content varies according to specific factual contexts. *Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.*
>
> 363 U.S. 442 (Emphasis added).

Such rights were plainly denied to CTEL when the FEC made a final, binding determination on the basis of specious appearances and gave LaRouche no opportunity to appear, submit rebuttal evidence or to contest its findings and decisions in denying CTEL's request for matching funds. Plainly when an agency makes such a determination, some form of notice and hearing is required. *Elliot v. Weinberger*, 564 F.2d. 1219, 1235 (9th Cir., 1977).

Even more compelling is the fact that the FEC singled

CTEL out for such "special treatment" based on CTEL's exercise of its First Amendment rights and its having asserted them against the FEC. To use the powers of law in order to harm CTEL is so contrary to the Constitution as barely to merit discussion. Yet the Court below failed to rule on this contention. The Supreme Court has stated the law to be contrary to this:

> If the Constitutional conception of equal protection of the law means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.

Department of Agriculture v. Moreno 413 U.S. at 534 (emphasis in original).

In *Moreno*, the Supreme Court invalidated a law aimed at the associational rights of "hippies", pointing out that Congress could not act against hippies' right to assemble in communes. Yet, the Court below upheld action by an agency which was aimed positively at CTEL for having supported LaRouche as its candidate for President, an activity closer to the core of the First Amendment than the gathering of food stamps at public expense. The Supreme Court has always closely inspected Congressional or other governmental activity when there is even the possibility that such activity was undertaken in order to discriminate against a person or party for having exercised its First Amendment rights. So strong is this policy that otherwise valid criminal convictions have been reversed or remanded for further inspection when such animus appears to be present. *U.S. v. Steele* 416 F.2d 1148, (9th Cir. 1972); *U.S. v. Oaks* 508 F.2d (9th Cir. 1974), remanded for hearing; *U.S. v. Berrios* 482 F.2d 171, 181 (2nd Cir. 1973). At the very minimum, the highly probable showing of politically motivated animus in the persons making the adverse decisions, Messrs. Harris and Oldaker, should have been fully explored rather than summarily disregarded. Cf. *U.S. v. Erne*, 576 F.2d 212 (9th Cir. 1978) (animus, if any, not in decision-maker).

Thus the very minimal Constitutional protections: notice and hearing prior to adverse decision, and freedom from invidious classification aimed at the exercise of fundamental constitutional rights was denied to CTEL. On these grounds alone the Court should grant certiorari in order to reverse the decision below.

THE FEDERAL ELECTION COMMISSION DID NOT COMPLY WITH ITS OWN MANDATE UNDER LAW

Title 26 of the U.S. Code, sections 9033 and 9037 provide all the requirements for eligibility for primary matching fund payments. On October 14, 1976, candidate LaRouche filed with the FEC a letter agreeing to all the required conditions, and certifying to or attesting that he met the threshold requirements. On October 27, 1976, CTEL provided the FEC with a computer printout listing of all its contributors, confirming that it had reached the minimum threshold requirements for matching funds. This submission was apparently satisfactory to the staff of the FEC, who assured CTEL that the submission would be placed on the agenda of the FEC meeting scheduled for November 4, 1976. (See Appendix p. 68a) According to the recommendations of staff counsel, in a memorandum of November 2, 1976 to the Commission, prior to the November 4 meeting, the only substantive question raised regarding CTEL's submission was whether or not certain contributions had been received prior to October 16. (See Appendix p. 69a-73a) Either the Commission willfully failed to address itself in a timely fashion to the question of the overall adequacy of CTEL's submission or it implicitly accepted it, merely raising minor problems of verification. Under such circumstances, the minor problems were susceptible to being promptly cured and the FEC would then have been obliged, under 26 U.S.C. 9036 to certify to the Secretary of the Treasury, *within 10 days*, the candidate's eligibility for primary matching funds payment.

Of course, even the FEC's eight-day wait, between the October 27, 1976 computer printout submission and the November 4 consideration of the submission's merits, caused a nonmajor party presidential candidate, burdened with debt from his primary campaign, extreme and unfair difficulty and hardship in the period leading up to the general election. This in itself indicates that the Commission was in no rush to provide CTEL with treatment equivalent to that accorded the major party candidates applying for matching funds—each one of whom was promptly certified by the Commission to the Secretary of the Treasury for payment and scrutinized later.

As the Court below found, Section 9036(a) of Title 26 of the U.S. Code "permits the Commission when determining if a candidate has established his eligibility under Section 9033(b) (3)-(4), to look beyond the face of the candidate's submission *only* if that submission (or that submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud." (See Slip Opinion at page 16.)

The FEC has argued in the Court below that, in fact, their three and a half month investigation of CTEL's submission, culminating in its rejection (without ever making an offer of proof of its claim or permitting petitioner the opportunity to rebut its allegations), was not initiated by any such "patent irregularities suggesting the possibility of fraud." (See Appendix, page 37a.)

Despite this straightforward admission by the FEC that it did not live up to its legislative mandate to certify matching funds payments expeditiously, the Court below ruled that the FEC's *ultra vires* audit of CTEL was nonprejudicial because it would have uncovered "patterns of irregularities". (Slip Opinion at page 28.)

Whether the FEC would have uncovered "patterns of irregularities" or would have invented an unending chain of speculation and suspicion, without allowing Petitioners to rebut the same, is discussed below. However, it is clear that although Petitioner had made the requisite agreements under 26 USC 9033(a) to provide the FEC with

whatever verification material was necessary, as early as October 14, 1976, and that the FEC had procured everything for which it had asked by February 2, 1977 at the latest (see Appendix, page 78a), it did not then act to certify LaRouche. Instead, in clear bad faith, it seized the opportunity to act on specious, untested information, to deny Petitioners' certification.

THE FEC STAFF CONSTRUCTED A "SINISTER WEB" TO PROVIDE SUPPORT FOR THEIR ALLEGATIONS OF IRREGULARITIES— IRREGULARITIES THEY NEVER PROVED

In its memorandum of December 27, 1976, the FEC staff, after two months of investigation, itself admitted that CTEL had met the threshold requirements for matching funds. "At the present time the Committee to Elect Lyndon LaRouche (CTEL) has reached the required threshold in 18 states and has collected in excess of $5,000 in 2 others. The Committee is currently obtaining the required documentation in these two states. The short fall is $69.00 in Connecticut and $195.00 in Indiana. It is the staff's belief that the requisite documentation will be submitted within a few days." (See Appendix p. 74a.)

Nonetheless, that same staff *then* proceeded to construct a "sinister web", weaving together certain isolated facts which could easily be understood as the necessary consequences of the constrained financial and personnel resources of a nonmajor party candidate, into a conspiracy to defraud the FEC and the taxpayers. Even in the single case on record, that of former presidential candidate Milton Shapp, where an actual conspiracy and actual irregularities *did* exist, the FEC did not launch a far-reaching, pre-disbursement investigation.

As a result of what can only be understood as the reluctance of the FEC and its staff to certify a nonmajor party candidate for matching funds, the staff's December 27 admission of LaRouche's eligibility for matching funds merely served to spur demands for additional, extraneous

information concerning campaign vendors and contributors.

Did the FEC ever investigate the groups of consecutively numbered money orders which provided them with the ostensible "pattern of irregularities" leading the Court below to justify an *ultra vires* investigation? No. Do any of the numerous memoranda circulated to the FEC by its staff ever even mention this "pattern of irregularities" which figures so largely in the opinion of the Court below? No. (See Appendix p. 37a.) Did any member of the FEC staff ever question CTEL about the frequently cited groups of consecutively numbered money orders? No. In sum, the FEC's "justification" for its extraordinary delay, far-reaching and burdensome audit, and harassment of contributors, is a *post facto* construction of its staff counsel. Had the court below permitted the discovery appellants requested to fill out the record, the bad faith evidenced by the sequence of events described above would have been glaring.

THE FEC'S INVESTIGATION WAS CONDUCTED IN BAD FAITH FOR THE PURPOSE OF CHILLING PETITIONERS' FIRST AMENDMENT RIGHTS.

As this Court reiterated in *Buckley v. Valeo* 424 U.S. 1 (1976) when discussing the consequences of limiting the funds available to a candidate seeking election, "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' (*NAACP v. Alabama* 357 US 449 at 460-461)." *Buckley v Valeo*, 424 US 1 at 26. The activities of the FEC in regard to the disbursement of matching funds, since they definitely concern the First Amendment rights of a candidate to political expression, cannot be evaluated on the "rational basis" standard, but also must withstand "strict scrutiny" that they were carried out in the fashion "least restrictive" of First Amendment rights.

The FEC, as we have shown above, was not investigating "facial irregularities" in CTEL's matching funds submission; nor was it spurred to investigation by the pattern of claimed "facial irregularities." Rather, the FEC was concerned with expanding its audit to the vendors of CTEL and co-lessees of its office space. The FEC was concerned with conducting early morning "surprise visits" to CTEL contributors and threatening them with jail terms (See *Jones v FEC*).

This court has also established standards for the breadth and reach of investigations like that conducted by the FEC.

> We have also insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed. See *Pollard v Roberts*, 283 F.Supp 248, 257 (E.D. Ark.) (three-judge court), aff'd, 393 U.S. 14 (per curiam). This type of scrutiny is necessary even if any deterrent effect on the exercise of the First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure. *NAACP v Alabama*, 357 US 449 at 461. Cf. *Kusper v Pontikes*, 414 US at 57-58.
>
> *Buckley v Valeo, supra* at 65-66.

The FEC may have confused bureaucratic curiosity with "relevant correlation," or it may have continued to manifest the bad faith cited above. However, the effect of its activities was the same. The FEC determined, according to its December 27 staff memo (see Appendix, p. 74a) that "it would be helpful" to examine the records of CTEL's major vendors. As well, noting that "the contributor's listed occupation seems unusual for fairly heavy political contributions", the staff recommended confirmation of contributions (all already documented by written instrument) should be done with contributors. (See Appendix, p. 75a). There was no allegation of "facial irregularity" or possible fraud. Rather, the inventive bu-

reaucrats at the FEC had hopes of developing some "helpful" angles upon which to hang its decision to deny CTEL equal treatment. Such inquisitiveness might not seem out of place in an Internal Revenue Service audit, or in the drawn out, leisurely proceedings of another regulatory agency, but it hardly meets the standards of strict scrutiny and those of least restrictive alternative means required, even if the deterrent effect on First Amendment rights is unintentional. Had petitioners' attorney not notified the FEC that legal action would be taken if LaRouche were not certified for matching funds (see Appendix, p. 81a), the FEC staff appears to have been prepared to "investigate" forever.

In fact, in their final recommendation to the FEC—pushed reluctantly to action by the urgent demands of CTEL—the staff's final conclusion, and recommendation that matching funds be denied was based *only* on information gathered at the end of January, 1977. That "information" was, in fact, merely the statements, made under considerable coercive pressure (see *Jones v FEC, supra*) of three contributors, stating that they had not made some or all of the contributions claimed for them by CTEL. Had those statements been subjected to the same exhaustive scrutiny every portion of CTEL's submission and records were, undoubtedly the statements would have been retracted. After three and one half months of "investigation," the staff provided the FEC only with "evidence" uncovered in the last two weeks. On that basis the FEC made its finding.

THE FEC'S ACTIONS REPRESENT INVIDIOUS DISCRIMINATION AGAINST A NONMAJOR PARTY CANDIDATE

Petitioners emphatically do not dispute the right of the FEC to establish procedures and regulations to carry out its mandate. However, this Court, while upholding the constitutionality of public financing, recognized that an appropriate factual demonstration could be made, based

upon the actual operation of public financing, to show that the implementation of the system invidiously discriminates against nonmajor parties and candidates. *Buckley v Valeo*, *supra* at 98.

The case at bar demonstrates precisely such a situation. The string of speculative requests, the nitpicking bureaucratic curiosity, and the browbeating of contributors is evident nowhere in the FEC's treatment of the fifteen Republican and Democratic candidates who made matching funds submissions.

The sensitive First and Fifth Amendment rights involved—particularly sensitive in the case of a nonmajor party candidate—were trampled by FEC staff, in pursuit of some unspecified theory of wrongdoing, unproven throughout the course of an arduous investigation. That investigation, far from being an effort "closely drawn to avoid unnecessary abridgment of associational freedom" *Buckley v Valeo*, *supra* at 25, wandered from pillar to post, resulting in no actual findings of fact, depriving LaRouche contributors of their constitutional rights, harassing the relatively few vendors who would consent to issue credit to a relatively unknown candidate, and culminated with the withholding of primary matching funds in violation of every principle of due process and equal protection.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Provisions of the United States Code

2 U.S.C. 437(d). Powers of Commission.

(a)The Commission has the power—

(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such a reasonable period of time and under oath or otherwise as the Commission may determine;

(2) to administer oaths or affirmations;

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 313(a) (9)), or appeal any civil action in the name of the Commission for the purpose of enforcing the provisions of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954, through its general counsel;

(7) to render advisory opinions under section 312 of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, United States Code, as are necessary to carry out the provisions of this Act and

chapter 95 and chapter 96 of the Internal Revenue Code of 1954;

(9) to formulate general policy with respect to the administration of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954; and

(10) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission, in case of refusal to obey a subpoena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance therewith. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) (1) Whenever the Commission submits any budget estimate or request to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) Except as provided in section 313(a)(9), the power

of the Commission to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

2 U.S.C. Section 438. Administrative provisions.

(a) Federal Election Commission; duties

It shall be the duty of the Commission—

(1) Forms

to develop and furnish to the person required by the provisions of this Act prescribed forms for the making of the reports and statements required to be filed with it under this subchapter;

(2) Manual for uniform bookkeeping and reporting methods

to prepare, publish, and furnish to the person required to file such reports and statements a manual setting forth recommended uniform methods of bookkeeping and reporting;

(3) Filing, coding, and cross-indexing system

to develop a filing, coding, and cross-indexing system consonant with the purposes of this subchapter;

(4) Public inspection; copies; sale or use restrictions

to make the reports and statements filed with it available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such persons: *Provided,* That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;

(5) Preservation of reports and statements

to preserve such reports and statements for a period of ten years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only five years from the date of receipt;

(6) Indices of reports and statements; publication in Federal Register

to compile and maintain a cumulative index of reports and statements filed with it, which shall be published in the Federal Register at regular intervals and which shall be available for purchase directly or by mail for a reasonable price, and to compile and maintain a separate cumulative index of reports and statements filed with it by political committees supporting more than one candidate, which shall include a listing of the date of the registration of any such political committee and the date upon which any such political committee qualifies to make expenditures under section 441a(a)(2) of this title, and which shall be revised on the same basis and at the same time as the other cumulative indices required under this paragraph;

(7) Special reports; publication

to prepare and publish from time to time special reports listing those candidates for whom reports were filed as required by this subchapter and those candidates for whom such reports were not filed as so required;

(8) Audits; investigations; priority audits and investigations

to make from time to time audits and field investigations with respect to reports and statements filed under the provisions of this subchapter, and with respect to alleged failures to file any report or statement required under the provisions of this subchapter, and to give priority to auditing and field investigating of the verification for, and the receipt and use of, any payments received by a candidate under chapter 95 or chapter 96 of title 26;

(9) Enforcement authorities; reports of violations

to report apparent violations of law to the appropriate law enforcement authorities; and

(10) Rules and regulations

to prescribe suitable rules and regulations to

carry out the provisions of this subchapter, in accordance with the provisions of subsection (c) of this section.

5 U.S.C. Section 555. Ancillary matters.

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

26 U.S.C. Section 9033. Eligibility for payments.

(a) *Conditions.* To be eligible to receive payments under section 9037, a candidate shall, in writing—

(1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses;

(2) agree to keep and furnish to the Commission any records; books, and other information it may request; and

(3) agree to an audit and examination by the Commission under section 9038 and to pay any amounts required to be paid under such section.

(b) *Expense limitation; declaration of intent; minimum contributions.* To be eligible to receive payments under section 9037, a candidate shall certify to the Commission that—

(1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035;

(2) the candidate is seeking nomination by a political party for election to the office of President of the United States;

(3) the candidate has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States; and

(4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.

26 U.S.C. Section 9038. Examinations and audits; repayments.

(a) *Examinations and audits.* After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under section 9037.

(b) *Repayments.*

(1) If the Commission determines that any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which such candidate was entitled under section 9034, it shall notify the candidate, and the candidate shall pay to the Secretary an amount equal to the amount of excess payments.

(2) If the Commission determines that any amount of any payment made to a candidate from the matching payment account was used for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses; it shall notify such candidate of the amount so used, and the candidate shall pay to the Secretary an amount equal to such amount.

(3) Amounts received by a candidate from the matching payment account may be retained for the liquidation of all obligations to pay qualified campaign expenses incurred for a period not exceeding 6 months after the end of the matching payment period. After all obligations have been liquidated, that portion of any

unexpended balance remaining in the candidate's accounts which bears the same ratio to the total unexpended balance as the total amount received from the matching payment account bears to the total of all deposits made into the candidate's accounts shall be promptly repaid to the matching payment account.

(c) *Notification.* No notification shall be made by the Commission under subsection (b) with respect to a matching payment period more than 3 years after the end of such period.

(d) *Deposit of repayments.* All payments received by the Secretary under subsection (b) shall be deposited by him in the matching payment account.

Section 9036 Certification by Commission.

(a) Initial Certifications. Not later than 10 days after a candidate establishes his eligibility under section 9033 to receive payments under section 9037, the Commission shall certify to the Secretary for payment to such candidate under Section 9037 payment in full of amounts to which such candidate is entitled under section 9034. The Commission shall make such additional certifications as may be necessary to permit candidates to receive payments for contributions under section 9037.

Section 9041 Judicial Review.

(a) Review of agency action by the Commission. Any agency action by the Commission made under the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia Circuit upon petition filed in such court within 30 days after the agency action by the Commission for which review is sought.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1184

COMMITTEE TO ELECT LYNDON LA ROUCHE, LYNDON LA ROUCHE, AND LEROY B. JONES, PETITIONERS

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Election Commission

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Argued September 27, 1978

Decided August 23, 1979

Robert Case Liotta with whom *Joel D. Joseph* was on the brief, for appellants.

Charles N. Steele, Associate General Counsel and *Barbara Van Gelder*, Attorney, Federal Election Commission, with whom *William C. Oldaker*, General Counsel, *Lester*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

N. Scall, Assistant General Counsel, Federal Election Commission, were on the brief, for appellee.

Before MCGOWAN and TAMM, *Circuit Judges*, and JUNE L. GREEN,* *District Judge*.

Opinion for the court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: This is a petition for review of a decision of the Federal Election Commission (Commission) withholding from Lyndon La Rouche, a 1976 candidate for the Presidential nomination of the United States Labor Party (USLP), certification to receive primary matching funds under the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 (1976).[1] The Commission refused to certify La Rouche on the ground that he had not established his eligibility under the fundraising threshold of the Act. Petitioners, La Rouche and the Committee to Elect Lyndon La Rouche (CTEL),[2] now raise both statutory and constitutional objections to the legal standards and certification procedures invoked by the Commission in making

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 US.C. § 292 (a) (1976).

[1] This petition for review was consolidated for purposes of oral argument with Jones v. Federal Election Commission, No. 77-2093, and Federal Election Commission v. Committee to Elect Lyndon La Rouche, et al., No. 77-1987, decided this date.

References herein to the petitioners' appendix and supplemental appendix in the instant case are designated as "P.A." and "S.A." respectively. In addition, references herein to the appendix in No. 77-2093 are designated as "A."

[2] The Committee to Elect Lyndon La Rouche (CTEL) was the principal campaign committee organized to obtain contributions for La Rouche and to manage his campaign. Throughout this opinion, we refer to La Rouche and CTEL interchangeably except where indicated otherwise.

that determination. For reasons stated below, we affirm the decision under review.

I

The Presidential Primary Matching Payment Account Act (Act), enacted in 1974, provides for limited public funding of Presidential primary elections by authorizing federal matching payments for certain small contributions to eligible candidates. The eligibility requirements are twofold.[3] First, a candidate must agree, in writing, (1) to provide to the Commission any evidence it requests regarding qualified campaign expenses, (2) to maintain and furnish to the Commission any records or other information it requests, and (3) to submit to an audit by the Commission under section 9038 of the Act and to repay any amounts required under that section. *Id.* § 9033(a). Second, a candidate must "certify" to the Commission that

> (1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035,
>
> (2) the candidate is seeking nomination by a political party for election to the office of President of the United States,
>
> (3) *the candidate has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States, and*

[3] The Commission's regulations, which were only proposed at the time La Rouche applied for matching funds, outline the eligibility requirements in detail. *See* 11 C.F.R. §§ 130.1-134.3 (1977). During the 1976 election, the Commission relied on its "interim guidelines" in determining whether to certify candidates to receive primary matching funds. *See* 40 Fed. Reg. 33817, 41933 (1975).

> (4) *the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.*

Id. § 9033(b) (emphasis added). The Act defines the term "contribution," for purposes of the fundraising threshold of section 9033(b)(3)-(4), as "a gift of money made by a written instrument which identifies the person making the contribution by full name and mailing address."[4] *Id.* § 9034(a).

The Commission, no later than ten days after a candidate "establishes his eligibility" under the aforementioned criteria, is required to certify to the Secretary of the Treasury for payment to the candidate the full amount to which he is entitled. *Id.* § 9036(a). That amount is equal to the first $250 or less in total contributions received from each contributor on or after the beginning of the calendar year immediately preceeding the calendar year of the Presidential election for which the candidate is seeking nomination. *Id.* § 9034(a). No candidate, how-

[4] The term "contribution," as defined for these purposes, does *not* include "a subscription, loan, advance, or deposit of money, or anything of value or anything described in subparagraph (B), (C), or (D) of section 9032(4)." 26 U.S.C. § 9034(a) (1976). Those subparagraphs of section 9032(4) refer to

> (B) . . . a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose,
>
> (C) . . . funds received by a political committee which are transferred to that committee from another committee, and
>
> (D) . . . the payment by any person other than a candidate, or his authorized committee, of compensation for the personal services of another person which are rendered to the candidate or committee without charge . . . .

Id. § 9032(4)(B), (C), (D). *See also* 11 C.F.R. § 130.8-.9 (1977).

ever, may receive matching funds in excess of one half of the total expenditure ceiling to which he has assented as a condition for establishing his eligibility. *Id.* §§ 9033 (b)(1), 9035(a). The Secretary, upon receipt of the Commission's certification for payment but not before the beginning of the calendar year in which the general election for the office of President will be held, is required to transfer promptly the certified amount from an account, known as the Presidential Primary Matching Payment Account,[5] to the candidate. *Id.* § 9037(b).

After a party selects its Presidential nominee, the Commission is required to conduct a thorough examination and audit of the qualified campaign expenses of any candidate who received matching funds in pursuit of the nomination. *Id.* § 9038(a). Matching funds that the Commission determines either (1) were received in excess of the amount to which a candidate was entitled or (2) were used for other than authorized purposes, must be repaid to the Secretary. *Id.* § 9038(b). Stiff criminal penalties also are provided for excess campaign expenses, the unlawful use of payments, false statements, and kickbacks and illegal payments. *Id.* § 9042.

II

The events culminating in this petition for review began on October 14, 1976, when La Rouche wrote the Commission requesting primary matching funds for his

[5] 26 U.S.C. § 9037(a) (1976). The Presidential Primary Matching Payment Account is one account in the Presidential Election Campaign Fund (Fund). *Id.* § 9006. The Fund is financed from the general fund of the Treasury in the aggregate amount that individual taxpayers, who may authorize payment to the Fund of one dollar on an individual return and two dollars on a joint return, have designated for such purposes on their tax returns. *Id.* §§ 6096, 9006(a). Other accounts are earmarked for financing party nominating conventions, *id.* § 9008, and general election campaigns, *id.* § 9006(b).

campaign for the USLP Presidential nomination. In his letter, La Rouche proffered the requisite agreements to establish his eligibility under section 9033(a) and "certified" that he also met the eligibility requirements of section 9033(b). This "certification" took the form of a one-page notarized statement that he met the eligibility criteria outlined in section 9033(b).[6]

The Commission staff raised two sets of questions concerning La Rouche's eligibility for matching funds. First, on October 21, 1976, the General Counsel of the Commission (General Counsel) requested La Rouche to submit additional information regarding, *inter alia*, the nominating procedures of the USLP and the states in which La Rouche was listed on the ballot as that party's Presidential candidate. This information, the General Counsel explained, was needed to ensure that La Rouche had in fact taken part in a "primary election" within the meaning of the Act, and, if so, to determine the appropriate cut-off date for counting contributions towards establishing his eligibility.

Second, the Commission staff requested further financial information to ensure that La Rouche had met the eligibility requirement of raising at least $5,000 in contributions of $250 or less in each of at least 20 states.

[6] The letter from La Rouche provided in relevant part:

> In compliance with Section 9033(b) of the Federal Election Campaign Laws, I hereby certify that:
>
> . . . .
>
> 3. I have received matching contributions which in the aggregate exceed $5,000 in contributions from residents of each of at least 20 states; and
>
> 4. The aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.

P.A. 1.

On October 14, 1976, when La Rouche applied for matching funds, CTEL had not as yet filed its disclosure report, due October 10, for financial activity in the third quarter of the year. Prior reports, which, contrary to the requirements of 2 U.S.C. § 434(b)(2), had failed to name and provide other identifying information about contributors of more than $100, revealed that CTEL had raised far less in the period after January 1, 1975, than the minimum threshold amount of $100,000. P.A. 15. Moreover, the third-quarter report, received on October 26, indicated that, between January 1, 1976, and September 30, 1976, CTEL had raised only $71,463.27 in total receipts. S.A. 9. The Commission staff, by telephone, asked counsel for La Rouche about the apparent shortfall and the lack of names and other identifying information for contributors of more than $100.

La Rouche's counsel submitted information in response to both sets of questions raised by the Commission staff. In connection with the USLP nominating procedures, he filed, on October 22, 1976, information revealing that La Rouche had been nominated as the Presidential candidate of the USLP at its national nominating convention on October 16, 1976. The information further indicated that the USLP national convention, at which La Rouche received the unanimous vote of the delegates from 30 states and the District of Columbia, was the culmination of a lengthy campaign during which La Rouche had sought and obtained the endorsement of the USLP Caucus in each of the 31 jurisdictions. With regard to the fundraising threshold, La Rouche's counsel, at a meeting with Commission staff members on October 27, 1976, submitted a computer printout that, in addition to providing the requisite information about contributors of over $100, indicated that, between October 1, 1975, and October 16, 1976, CTEL had received over $5,000 in contributions in each of at least 20 states. P.A. 15; S.A. 4.

During the course of the October 27 meeting, the Commission staff indicated that the Commission was likely to consider these matters at its meeting scheduled for November 4, 1976, and, assuming that it decided to go forward with a field audit of the threshold submission, that audit would begin during the week following its meeting. P.A. 13-14. Rather than awaiting the Commission's decision, however, CTEL, on October 28, 1976, filed suit in the District Court for the District of Columbia alleging that the Commission could not lawfully withhold matching funds pending verification of the fact that La Rouche had met the fundraising minimum. *Committee to Elect Lyndon La Rouche v. Federal Election Commission*, C.A. No. 76-2010 (D.D.C. 1976). The District Court, on October 29, denied injunctive relief, and this court, on November 1, refused to grant a stay pending appeal. In December, the case was dismissed with the approval of the District Court.

Meanwhile, on November 2, 1976, the Commission staff, after reviewing La Rouche's application and supplemental submissions, reported its recommendations to the Commission. With regard to the USLP nominating procedures, the staff expressed the view that "assuming the caucus process . . . is verifiable, Mr. La Rouche, through October 16, was a candidate for nomination of a political party, and therefore meets the requirements of [section] 9033(b)(2)." P.A. 15. With regard to the fundraising threshold, the staff noted that no other application for matching funds during the 1976 election had raised the question of whether a candidate had met the threshold amount. Staff urged the Commission to authorize a field audit of the contributions to La Rouche's primary campaign, to focus in part on whether certain contributions deposited after La Rouche was nominated on October 16, 1976, but reportedly received before that date, were in fact received before the nomination. This recommended

focus reflected the General Counsel's position that, under the Act, only those contributions received before a candidate is nominated may be counted for the purposes of establishing the candidate's eligibility for primary matching funds.

On November 4, 1976, the Commission authorized the staff to conduct a field audit in order to verify La Rouche's eligibility for matching funds. S.A. 5. That audit, which took place shortly thereafter at CTEL's headquarters in New York City, revealed that CTEL had in its possession written instruments evidencing campaign contributions in excess of the threshold amount in 18 states and that, with the submission as promised of certain additional documentation, it would soon cross the threshold in two more states, Connecticut and Indiana. But, in addition to this soon to be corrected shortfall, the audit uncovered many instances where contributions made by money order or cashier's checks raised substantial questions as to whether the contributions were in fact made by residents of the states indicated.[7] The audit also

[7] For example, the documentation of the contributions to La Rouche's campaign revealed that many of the money orders and cashier's checks were given in patterns that raised substantial statutory questions. Examples are set forth below:

(1) The following money orders were all drawn from the Bowery Savings Bank in New York City:

Serial numbers	Date	State Submitted
4-114337	10/15/76	Massachusetts
4-114338	10/15/76	Colorado
4-114339	10/15/76	Massachusetts
4-114341	10/15/76	North Carolina
4-114342	10/14/76	Delaware
4-114343	10/15/76	Massachusetts
8-obliterated	10/08/76	Connecticut
8-060756	10/12/76	Colorado

[Continued]

revealed a pattern of heavy last-minute contributions from persons listing their occupation as that of "volunteer coordinator" for the National Caucus of Labor Committees (NCLC),[8] an organization that, during the last two weeks of the eligibility period, received payments from CTEL of more than $310,000, which accounted for 55% of CTEL's expenditures during the period. It further indicated that CTEL shared office space and common personnel with NCLC and three other organizations (New Solidarity International Press Service, Inc., Campaigner Publications, Inc., and the United States Labor Party) and that those organizations accounted for 78% of CTEL's expenditures and 97% of its debt. These findings seemed particularly significant in light of the fact that CTEL had surpassed the $5,000 threshold by only a narrow margin in at least several states.

[7] [Continued]

Serial numbers	Date	State Submitted
8-063400 (or 409)	10/13/76	Indiana
8-063407	10/13/76	Massachusetts
8-063408	8/01/76	North Carolina
8-06341(?)	10/08/76	Colorado

(2) The following cashier's checks were all drawn from the Pacific National Bank of Washington:

2255209	9/28/76	Washington
2255210	9/28/76	Washington
2255217	9/29/76	Oregon
2255218	9/29/76	Oregon
2255219	9/29/76	Oregon
2255220	9/29/76	Oregon
2652293	10/05/76	Washington
2652294	?	Oregon

[8] The audit indicated that NCLC volunteer coordinators, who contributed 16% of the total contributions received, accounted for as much as 83.2% of the contributions during October.

On December 27, 1976, the Commission staff submitted to the Commission two recommendations based on the field audit of CTEL's records. The first recommendation, which the Commission adopted on December 29, 1976, was to expand the field audit to include an examination of the records of the four organizations related to CTEL. The second recommendation, which was adopted on January 14, 1977, was to conduct a "confirmation of contributions with contributors . . . before any initial payments are made." P.A. 18, 24, 25.

The direct verification of CTEL contributions took place during the week of January 26, 1977, when, after notifying CTEL, the Commission staff embarked on field interviews of individuals listed as CTEL contributors in three states, Delaware, Massachusetts, and Wisconsin. In the vast majority of cases, the staff was unable to locate the contributors in question, either because of insufficient time or because the contributors were not home or did not live at the address indicated. But, on the basis of those cases where the contributors were interviewed, the staff obtained information indicating that La Rouche had not in fact met the threshold requirement in either Delaware or Wisconsin.[9]

On February 2, 1977, CTEL submitted the documentation of contributions from Connecticut that, at least according to the results of the initial audit, would have established that La Rouche had crossed the fundraising threshold in the last of 20 states. That documentation, it was asserted, established La Rouche's eligibility under section 9033(b)(3)-(4) for matching funds and triggered the Commission's obligation under section 9036(a) to certify La Rouche's eligibility for payment to the Secre-

[9] The results of the field interviews indicated a shortfall of at least $383.25 in Delaware and $317.38 in Wisconsin. *See* page 31 *infra*.

tary of the Treasury within ten days. Legal action was threatened if the Commission did not certify La Rouche before February 14, 1977.

On February 10, 1977, the Commission, relying on the results of the field interviews, concluded that La Rouche had not met the threshold requirement of raising at least $5,000 in contributions of $250 or less in each of 20 states. By so doing, the Commission rendered La Rouche ineligible to receive primary matching funds.[10] This petition for review of the Commission's decision was filed pursuant to 26 U.S.C. § 9041 on February 14, 1977.

III

This petition for review challenges on both statutory and constitutional grounds the Commission's refusal to certify La Rouche's eligibility to receive primary matching funds. Petitioners' principal claim is that the Commission, by overstating both the burden that a candidate must shoulder to establish his eligibility under the fundraising threshold of the Act and the role that the Commission is authorized to play in certifying a candidate's eligibility, violated the Act when it rejected La Rouche's application for matching funds. Petitioners also object on a variety of grounds to the investigative procedures invoked by the Commission in determining that La Rouche had not demonstrated his compliance with the fundraising threshold.

[10] Neither the parties, nor do we, address the question of whether La Rouche, through October 16, 1976, was "seeking nomination by a political party" for President, as required by section 9033(b)(2). Although the Commission suggests in its brief that it determined that La Rouche had complied with section 9033(b)(2), Resp. Brief at 11 n.5, we find no evidence in the record indicating that the Commission itself, as opposed to its staff, made such a determination.

We examine these interrelated claims in the context, first, of determining what obligations the Act, consistent with the Constitution, imposes on both a candidate and the Commission during the process of certifying a candidate's compliance with the fundraising threshold of the Act, and, second, of assessing whether, in the instant case, the Commission properly determined that La Rouche had not established his eligibility under the fundraising threshold.

A

Two statutory provisions lie at the heart of the controversy over the respective roles of a candidate and the Commission during the certification process. The first provision, section 9033(b), provides that a candidate, as a condition precedent to qualifying for matching funds, "shall *certify* to the Commission that . . . (3) [he] has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States, and (4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250" (emphasis added). The second provision, section 9036(a), requires that "[n]ot later than 10 days after a candidate *establishes his eligibility* under section 9033 . . ., the Commission [shall] certify to the Secretary for payment to such candidate . . . payment in full of amounts to which such candidate is entitled" (emphasis added).

The Act, however, defines neither the term "certify" in section 9033(b) nor the phrase "establishes his eligibility" in section 9036(a). In the absence of such definitions, the parties urge upon this court markedly different views of both what a candidate must do to establish his compliance with the fundraising threshold and what role the Commission is authorized to play during the certification process.

Petitioners argue that a candidate seeking to establish his eligibility under section 9033(b) need only "attest authoritatively" in good faith and with knowledge that he has met the fundraising threshold. The Commission's role under section 9036(a), according to petitioners, is limited to ensuring that the candidate has so attested. This construction of the Act, we are told, finds support in (1) common usage of the term "certify," (2) the intent of Congress revealed in section 9036(a) to provide prompt payments to eligible candidates, and (3) the fact that the Act contains other mechanisms, including criminal sanctions and civil repayment provisions; adequate to ensure compliance with the eligibility requirements. Moreover, petitioners argue that if the Act were interpreted as providing for a lengthy and detailed certification process, it would be unconstitutional as regards La Rouche.

The Commission asserts that the candidate's burden in establishing his eligibility under the fundraising threshold of the Act is discharged not by attesting that he has raised the threshold amount, but rather by demonstrating to the Commission's satisfaction that he has adequate documentation to establish that the threshold amount has been raised. We are also urged to conclude that the Commission, in determining whether a candidate has discharged this burden, is empowered not only to review the documentation of campaign contributions submitted by the candidate in support of his application for matching funds, but also to audit the records of his campaign contributions, and, if necessary, to verify reported contributions by means of interviewing individual contributors. This view of the certification process, the Commission argues, is supported by (1) the plain language of section 9036(a) requiring a candidate to "establish[] his eligibility" for matching funds, (2) the policy underlying section 9033(b) of withholding matching funds from

frivolous candidates, and (3) the broad investigative powers vested in the Commission under the Act, 26 U.S.C. § 9039(b) (1976).

The starting point in our inquiry into the respective statutory obligations of a candidate and the Commission during the certification process is, of course, the language of the Act itself. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). In this regard, we note that, on the one hand, section 9033(b) requires a candidate to "certify" his compliance with the fundraising threshold and, on the other, section 9036(a) requires the Commission, "[n]ot later than 10 days after a candidate establishes his eligibility under section 9033," to approve the candidate's application for matching funds. Thus, if we were to give the word "certify" its ordinary meaning, which is "to attest authoritatively [in writing]," [11] the Act would require the Commission, once a candidate had so attested, to approve his application within 10 days. The Commission, under this reading of the Act, would perform the quite limited task of rubberstamping notarized statements of eligibility.

Such a certification process, we have no doubt, is not what Congress intended when it enacted the provisions at issue. Even petitioners recognize this point, conceding that not "anyone who signed . . . a statement [of eligibility] would immediately become eligible for funds; clearly an element of knowledge and good faith is involved." Pet. Br. 7. It is obvious, therefore, that we cannot interpret the statutory provisions at issue solely by reference to their wording.

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[11] Doherty v. McDowell, 276 F. 728, 730-31 (D. Me. 1921) ("certify" defined as "to attest authoritatively" and "any form which affirms the fact in writing is sufficient"); *accord* Higby v. Hooper, 124 Mont. 331, 221 P.2d 1043 (1950); Bates v. Bates, 247 Ala. 337, 24 So. 2d 440 (1946).

In the absence of any specific directive in the legislative history, we must turn instead to the policies underlying the Act as a guide to our task of statutory interpretation. The policies relevant here are twofold. First, Congress, in enacting the fundraising threshold of section 9033(b)(3)-(4), sought to withhold public funds from frivolous candidates. In this regard, the Committee on House Administration took the position that

> this modest threshold requirement is the most reasonable and best practicable test to assure that public funds are provided to serious candidates. By matching only small contributions the threshold provides a means of testing public support of a candidate and encourages a candidate to involve large numbers of voters in his fundraising efforts.

H.R. REP. No. 1239, 93d Cong., 2d Sess. 13 (1974); *accord*, S. REP. No. 689, 93d Cong., 2d Sess. 6 (1974) ("Such assistance is limited to those who demonstrate they are serious candidates by raising a threshold eligibility fund in small amounts from many contributors."). Second, Congress, by requiring the Commission under section 9036(a) to certify payments to a candidate not more than 10 days after the candidate establishes his eligibility, evidenced an intent to provide prompt payments to eligible candidates. The 10-day deadline serves to ensure that an eligible candidate will have the money he needs at a time when its availability is most important to his campaign.

The best way to accommodate these two policies is, we think, to construe the Act essentially along the lines advanced by the Commission. That is to say, we agree that the Act requires a candidate seeking to establish his eligibility under section 9033(b)(3)-(4) to demonstrate to the Commission's satisfaction that he has adequate documentation to establish that the threshold amount has been raised. But, in light of the policy favoring prompt pay-

ments to eligible candidates, we find it necessary to circumscribe to a certain extent the scope of the Commission's investigative role during the certification process.

To be specific, we construe the Act to provide for a certification mechanism that works as follows: The candidate's burden in establishing his eligibility under section 9033(b)(3)-(4) is to submit documentation demonstrating that he has met the fundraising threshold. The candidate may do so either by submitting to the Commission the written instruments evidencing his campaign contributions [12] or by making an equivalent showing.[13]

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[12] The Act defines the term "contribution," for the purposes of the fundraising threshold of section 9033(b)(3)-(4), as "a gift of money made by a *written instrument* which identifies the person making the contribution by full name and mailing address." 26 U.S.C. § 9034(a) (1976) (emphasis added). *See* note 3 *supra*. The Commission's regulations carry forth the requirement that a "contribution" be made by written instrument. 11 C.F.R. § 130.8 (1977).

[13] Section 131.2(c) of the Commission's regulations, which was proposed at the time La Rouche applied for matching funds but not yet final, now defines what documentation a candidate must submit to establish his eligibility under section 9033(b)(3)-(4) of the Act. This regulation, which we find consistent with the Act, provides:

> For each State in which the candidate certifies he or she has met this requirement, the candidate shall—
>
> (1) Submit an alphabetical list of contributors showing each contributor's full name and residential address, the date of the receipt of each contribution by the candidate or his or her committee and of the deposit into the designated campaign depository, the dollar amount of each contribution submitted for matching purposes, the matchable portion thereof, the total amount of all matchable contributions submitted, and a notation as to whether the contribution was received as a result of an entertainment activity under § 130.9(i); and

[Continued]

The Commission's role under section 9036(a) is then to review the submission to determine whether it adequately documents the candidate's compliance with the fundraising threshcld. That determination, with a narrow exception discussed below, is limited to deciding, on the face of the candidate's submission, (1) whether the reported contributions are in fact "contributions" within the meaning of the Act, 26 U.S.C. § 9034(a) (1976), and (2) whether the contributions that meet the statutory definition exceed the threshold amount, *id.* § 9033(b)(3)-(4). If this determination is adverse to a candidate, the Commission should so notify the candidate and permit him to resubmit his fundraising documentation. If the determination is favorable, and if the candidate has met the other eligibility requirements, the Commission, no later than 10 days after its final determination of eligibility, is required to certify for payment to the candidate the full amount to which he is entitled. *Id.* § 9036(a).

The limited exception under which the Commission's section 9036(a) determination is not restricted to the face of the candidate's submission is where that submission (or that submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud.[14] In such a case, the

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[13] [Continued]

> (2) Submit a photocopy of each check or other written instrument for each contribution which the candidate submits to receive matching funds. The photocopies shall be segregated alphabetically by deposit, and shall be accompanied by copies of the relevant deposit slip.

11 C.F.R. § 131.2(c)(1)-(2) (1977).

[14] The issue before us is the extent to which section 9036(a) permits the Commission to look beyond the face of a candidate's threshold submission in determining whether the candidate has established his eligibility for matching funds. Our conclusion that the Commission may do so only where it dis-

Commission is empowered, as part of the certification process, to conduct a properly circumscribed investigation, including an audit of the candidate's records [15] and, if necessary, field interviews of the contributors to his campaign.[16] The Commission, on the basis of the candidate's

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covers that the threshold submission (or the submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud in no way restricts the Commission's otherwise broad investigative powers outside the certification process. *See* note 17 *infra*.

[15] Petitioners argue that the Commission is without statutory authority to conduct an audit during the certification process because the audit and repayment provisions of section 9038 contemplate an audit only *after* a candidate has received matching funds. We are urged to conclude, under the principle of *expressio unius est exclusio alterius*, that Congress, by expressly providing only for post-certification audits, intended not to authorize pre-certification audits.

The flaw in this argument is that petitioners have overlooked section 9039(b), which provides:

> The Commission is authorized to prescribe rules and regulations in accordance with the provisions of subsection (c), *to conduct examinations and audits (in addition to the examinations and audits required by section 9038 (a))*, to conduct investigations, and to require the keeping and submission of any books, records, and information, which it determines to be necessary to carry out its responsibilities under this chapter.

(Emphasis added). It would be inappropriate, in our view, to draw the inference suggested by petitioners because section 9038 is not the exclusive repository of the Commission's auditing authority.

[16] The Commission's statutory authority to conduct field interviews during the certification process is encompassed in its broad investigative mandate "to conduct examinations and audits (in addition to the examinations and audits required by section 9038(a)) [and] to conduct investigations . . . which it determines to be necessary to carry out its responsibilities under [the Act]." 26 U.S.C. § 9039(b) (1976). This conclusion finds support in the fact that Congress has indi-

submission and its own inquiry, must then determine whether the candidate in fact has established his compliance with the fundraising threshold. *Id.* § 9036(a).

This interpretation of the Act serves the policies underlying both statutory provisions at issue. The policy underlying section 9033(b)(3)-(4), which is to withhold funds from frivolous candidates, is served by requiring a candidate either to submit to the Commission the written instruments evidencing campaign contributions or to make an equivalent showing. This requirement will provide the Commission with a ready means of detecting, and denying certification to, a candidate who has not raised the threshold amount. If the threshold submission does not adequately document the candidate's compliance with the fundraising threshold, the Commission is empowered, indeed required, to withhold certification until the candidate submits appropriate documentation. If the threshold submission contains patent irregularities suggesting the possibility of fraud, the Commission is authorized to conduct an investigation during the certification process to determine whether the candidate in fact has raised the threshold amount.[17]

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cated elsewhere in the Federal Election Campaign Act, *see* 2 U.S.C. § 438(a)(8) (1976), that the Commission's investigative authority to conduct post-nomination "examination[s] and audit[s]" under section 9038 includes the power to verify contributions by means of field interviews. Inasmuch as the plain language of section 9039(b) confers upon the Commission even broader investigative authority than that of section 9038, we think it follows that Congress must have intended to vest the Commission with the authority to conduct field interviews under section 9039(b) as well.

[17] Nor is the Commission powerless to protect the fisc in the unlikely event that a fraudulent submission is not evident on its face. Nothing in this opinion restricts the Commission's authority to conduct investigations under section 9039(b) outside the certification process, *see* note 14 *supra*, its author-

The policy underlying section 9036(a), which is to provide prompt payments to eligible candidates, is served by limiting the role of the Commission during the certification process to reviewing the face of a candidate's threshold submission except where that submission (or that submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud. We so limit the Commission's investigative role because long delays are sure to ensue in cases where the Commission looks beyond the face of a candidate's threshold submission during the certification process.[18] In the instant case, for example, the Commission took more than three months after it authorized the initial audit of CTEL's records to reach a final decision on La Rouche's eligibility. Accordingly, we construe section 9036(a) to permit the Commission, as part of the

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ity under section 9038 to conduct post-nomination audits and to seek recoupment of overpayments, or its general investigative and enforcement authority under the Federal Election Campaign Act, *see, e.g.*, 2 U.S.C. §§ 437d, 437g (1976).

[18] By contrast, the Commission has imposed on itself a five-day deadline for making a preliminary determination of a candidate's eligibility on the basis of his threshold submission. The Commission's regulations provide:

> During the matching payment period, the Commission shall, as soon as practicable and generally *within 5 working days*, examine the submission under § 131.1 and § 131.2(a), (b), and (c) and shall either—
>
> (a) Make a preliminary determination that the candidate has satisfied the requirement of raising an amount in excess of $5000 in contributions from individuals who are residents of each of at least 20 States, which in respect to any individual do not exceed $250; or
>
> (b) Promptly notify the candidate giving a detailed explanation of the reasons for the Commission's conclusion that the candidate has failed to satisfy the matching payment threshold requirements.

11 C.F.R. § 131.3 (1977) (emphasis added).

certification process, to conduct an investigation beyond the face of a candidate's threshold submission only in cases where patent irregularities appear on the face of that submission. Such cases are unlikely to involve candidates who are in fact eligible for matching funds.

The certification mechanism outlined above is far better tailored to the policies underlying the Act than that advocated by petitioners. To adopt petitioners' view that the Commission must certify any candidate who, acting knowingly and in good faith, "attests authoritatively" that he has met the fundraising threshold would be, we think, to restrict unduly the Commission's ability to detect frivolous candidates by shielding it from the documentation of the candidate's contributions.[19] Nor would petitioner's interpretation of the certification process necessarily serve the policy of providing prompt payments to eligible candidates. It is our view that the inexact standard of whether a candidate acted "knowingly and in good faith" might well result in lengthy investigations into what a candidate knew, or should have known, about his campaign contributions at the time he applied for matching funds.

An additional advantage of the certification process outlined above over that advanced by petitioners is that the former, unlike that latter, involves objective standards. The Commission, under our interpretation of section 9036(a), must determine as an initial matter (1) whether a candidate's threshold submission adequately documents his compliance with the fundraising threshold

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[19] Nor do we feel that petitioners' reading of the statute is compelled by the fact that the Act contains other mechanisms, including criminal sanctions and civil repayment provisions, also designed to ensure compliance with the eligibility requirements. Nothing in the legislative history suggests that Congress regarded those other mechanisms as sufficient to protect against frivolous candidates receiving matching funds.

and (2) whether that submission contains patent irregularities suggesting the possibility of fraud. Both inquiries involve essentially objective determinations regarding the adequacy of the threshold submission. The inquiry under petitioner's view of the certification process would include the more subjective question of whether the candidate acted in "good faith" when he certified his compliance with the fundraising threshold.

The advantage of an objective standard stems from the fact that, as petitioners themselves emphasize, the certification decision has an important impact on the exercise of first amendment rights, inasmuch as campaign funds "are often essential if 'advocacy' [of beliefs and ideas] is to be truly or optimally 'effective.'" *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976). It also stems from the fact that the issue of whether a candidate has met the fundraising threshold often will arise in cases where a candidate either lacks national prominence or belongs to a minor party outside the mainstream of American politics. Given our national commitment to open and robust discussion of all political viewpoints, *see, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), we regard it as particularly important to ensure that the Commission is applying the eligibility criteria for primary matching funds in an even-handed manner. Accordingly, we are reluctant to endorse a subjective standard such as "good faith" belief, preferring instead objective standards that circumscribe the Commission's discretion and permit more meaningful judicial review.

For essentially the same reasons that we believe that objective standards should govern the certification decision, petitioners argue that if the Act were interpreted as providing for a lengthy and detailed certification process, it would violate the first amendment as a prior restraint on La Rouche's right to free speech. Citing the important role that campaign funds play in the advocacy

of political beliefs, petitioners assert that "a procedure that would jeopardize the payment of matching funds, in the period precedent to the election when they would be crucial to the effective expression of political viewpoints, would be a serious abridgment of associational rights and free speech."

It is our view, however, that, at least as regards La Rouche, the certification process outlined above is constitutional. In upholding the constitutionality of fundraising thresholds for federal matching funds, the Supreme Court in *Buckley v. Valeo* noted:

> The States have . . . been held to have important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support. *E.g., Storer v. Brown, supra*, at 736; *Lubin v. Panish, supra*, at 718-719; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Williams v. Rhodes*, 393 U.S., at 31-33. Congress' interest in not funding hopeless candidacies with large sums of public money, S. Rep. No. 93-689, *supra*, at 7, necessarily justifies the withholding of public assistance from candidates without significant public support. *Thus, Congress may legitimately require "some preliminary showing of a significant modicum of support," Jenness v. Fortson, supra*, at 442, *as an eligibility requirement for public funds.*

424 U.S. at 96 (emphasis added). Surely then, if Congress can require this preliminary showing of support as an eligibility requirement for matching funds, it can also impose reasonable procedures for ensuring that a candidate in fact has the requisite degree of support. The certification process outlined above is, we think, entirely reasonable, especially insofar as it permits the Commission to look beyond the face of a candidate's threshold submission only if that submission contains patent irregularities. Certainly, on the record in this case (which we explore in detail below), La Rouche has failed

to demonstrate that the Commission acted unreasonably, or even that it erred, in rejecting his application for matching funds.

In sum, we adopt the certification process outlined above, for it best serves the policies underlying the Act and turns on objective standards that circumscribe the Commission's discretion and permit more meaningful judicial review. Moreover, we see no first amendment barrier, at least as regards La Rouche, to our interpretation of the Act.

B.

It remains for us to determine whether the Commission, on the facts presented here, properly determined that La Rouche was ineligible for matching funds because he had not satisfied the threshold requirement of section 9033(b)(3)-(4). Petitioners argue, on the basis of their interpretation of the Act, that La Rouche established his eligibility for matching funds either (1) on October 14, 1976, when he submitted a sworn statement that he had raised the threshold amount, (2) on October 27, 1976, when CTEL submitted a computer printout that listed contributions in excess of the threshold amount, or (3) on February 2, 1977, when CTEL submitted documentation that, at least according to the results of the initial audit, would have established that La Rouche had crossed the fundraising threshold in the last of 20 states. The Commission takes the contrary view that, under its interpretation of the Act, La Rouche failed all along to establish his eligibility for matching funds.

In light of the legal standards outlined in the preceding section, we now review the merits of the Commission's refusal to certify La Rouche's eligibility for matching funds. We are cognizant of course that the scope of our review is limited to determining whether the Commission's action was "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976).[20]

Turning to the facts at hand, we may quickly dispose of petitioners' argument that La Rouche established his eligibility for matching funds during October 1976. The candidate's burden in establishing his eligibility under section 9033(b)(3)-(4) is, as we outlined above, to submit documentation demonstrating that he has met the fundraising threshold. The candidate may discharge this burden either by submitting to the Commission the written instruments evidencing his campaign contributions or by making an equivalent showing. It is beyond question that, on October 14, 1976, La Rouche had not established his eligibility under section 9033(b)(3)-(4), inasmuch as he had done no more than to submit to the Commission a one-page notarized statement that he had met the fundraising threshold. Nor can we say that the Commission acted arbitrarily or capriciously in refusing to certify La Rouche on the basis of the computer printout submitted on October 27, 1976, which listed contributions in excess of the threshold amount. It is our view that the Commission properly determined that a computer printout, which simply summarizes undocumented data, is not a showing equivalent to the documentation itself. Accordingly, we find no merit to petitioners' argument

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[20] The Act provides that judicial review of action taken by the Commission is governed by the Administrative Procedure Act, *see* 26 U.S.C. § 9041 (1976), which, in turn, provides that, where as here agency action is not subject to formal rulemaking procedures, the applicable standard of review is whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *see* 5 U.S.C. § 706(2)(A) (1976). *Cf.* United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). *See* generally Natural Resources Defense Council v. SEC, No. 77-1761, slip op. at 28-41 (D.C. Cir. April 20, 1979); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1024-28 (D.C. Cir. 1978).

that the Commission erred in not approving La Rouche's applications for matching funds in October 1976.

Nor do we find reversible error in the Commission's decision, on November 4, 1976, to authorize a staff audit of CTEL's records in New York for the purpose of verifying La Rouche's eligibility for matching funds. Section 9036(a), as construed above, permits the Commission when determining if a candidate has established his eligibility under section 9033(b)(3)-(4), to look beyond the face of the candidate's threshold submission only if that submission (or that submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud. The information on hand when the Commission authorized the audit of CTEL's records included (1) La Rouche's original application for matching funds, submitted on October 14, 1976, in which he asserted that he had met the fundraising threshold, (2) CTEL's third-quarter report, submitted on October 26, 1976, which indicated that, between January 1, 1976, and September 30, 1976, CTEL had raised $71,463 in total contributions, and (3) the computer printout, submitted on October 27, 1976, which listed contributions in excess of $5,000 in each of 20 states.

It was obvious from the face of these submissions, especially the computer printout, that if La Rouche had surpassed the fundraising threshold, he had done so only by a narrow margin. This fact surely warranted the Commission in keeping a close eye on the sufficiency of the documentation of the contributions to La Rouche's campaign, but it did not amount to a patent irregularity suggesting the possibility of fraud. Nor was it a patent irregularity that the computer printout raised the question whether certain contributions deposited after La Rouche was nominated on October 16, 1976, but reportedly received before that date, were in fact received before the nomination. Accordingly, because the information on hand revealed no patent irregularities, the Commission was not warranted in conducting an investigation beyond the face of La Rouche's threshold submission. Rather than authorizing an audit of CTEL's records, the Commission, which of course was under no obligation to certify La Rouche's eligibility, simply should have awaited further submissions in support of his eligibility.

Even though the Commission acted *ultra vires* in authorizing the audit of CTEL's records, we regard this error as nonprejudicial. If the Commission followed the proper course of awaiting a further submission from La Rouche and if La Rouche had in fact submitted the requisite documentation under section 9033(b)(3)-(4), the documentation would have contained, as the Commission audit revealed, patent irregularities that surely would have warranted an inquiry beyond the face of the threshold submissions. Those irregularities were numerous instances of contributions by money orders and cashier's checks that raised substantial questions as to whether the contributions were made by residents of the states indicated. *See* note 7 *supra*. Therefore, because these irregularities would have been uncovered in any event if La Rouche had submitted the requisite documentation under section 9033(b)(3)-(4), we sustain the Commission's audit, even though unauthorized by statute, as nonprejudicial error.[21] *See* Administrative Procedure Act § 10

[21] The appropriate remedy in a case where the Commission wrongfully seeks to conduct an audit or field interviews during the certification process is a petition for review in this court. *See* 26 U.S.C. §§ 9036(a), 9041(a) (1976). Section 9041(a) provides that:

> Any agency action by the Commission made under the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Colum-

(e), 5 U.S.C. § 706 (1976) ("due account shall be taken of the rule of prejudicial error").

The Commission, once confronted with these patent irregularities, was warranted, we think, in taking further investigatory action. It was neither unreasonable nor in excess of statutory authority for the Commission, in light of the questions raised by the money orders and cashier's checks about the states in which certain contributors resided, to authorize field interviews of CTEL contributors to verify their donations to La Rouche's campaign,[22]

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bia Circuit upon petition filed in such court within 30 days after the agency action by the Commission for which review is sought.

A Commission decision to conduct an investigation during the certification process on the ground that a candidate's threshold submission contains patent irregularities is, we think, "agency action" within the meaning of section 9041(a).

[22] Petitioners challenge the legality of the field interviews on the ground that they were not authorized by majority vote of the Commission as required by 2 U.S.C. § 437c(c) (1976). Section 437c(c) provides in relevant part:

> All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this subchapter shall be made by a majority vote of the members of the Commission. . . . A member of the Commission may not delegate to any person his vote or any decisionmaking authority or duty vested in the Commission by the provisions of this subchapter.

It is petitioners' position that the Commissioners never voted at all on this matter, but simply raised no objection to a staff memorandum recommending that the filed interviews be conducted and stating that "[i]f no objection is raised within 24 hours, the staff will proceed as outlined above." P.A. 24.

This argument, we think, falls short of the mark, for section 437c(c) requires only that a majority vote be taken, not that it be taken in any specified manner. The record reveals that the Secretary of the Commission distributed the staff memorandum to the six Commissioners on January 13, 1977,

nor was it error, given the aforementioned irregularities and the pattern of last-minute contributions from volunteer co-ordinators of an organization closely related to CTEL, to authorize an audit of the books of that and other such organizations. Both the field interviews, which focused on contributions reported in three representative states, and the expanded audit, which focused on the books of those organizations closely related to CTEL, were properly circumscribed in the sense that they were reasonable investigatory responses to the irregularities uncovered in the initial audit.

As a final matter, we think that the Commission acted properly when, on February 7, 1977, it formally rejected La Rouche's application for matching funds on the ground that he had not established his eligibility under section 9033(b)(3)-(4). Petitioners argue that La Rouche established his eligibility on February 2, 1977, when CTEL submitted to the Commission the documentation of contributions found lacking in the initial audit of CTEL's books. This argument falls short of the mark, however, because it misconceives the appropriate legal standard. The issue before the Commission where, as here, patent irregularities are discovered in the documentation underlying the contributions to a candidate is not whether the candidate has documentation to establish that he has raised the threshold amount, but rather

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that five of the six Commissioners returned the memorandum the next day without objection, and that the sixth Commissioner who did not return the memorandum nevertheless raised no objection to the proposed action. A. 59-60. On the basis of this response, the Secretary of the Commission, on January 14, 1977, certified that the Commission had adopted the staff proposal. P.A. 25. It is our view that given the fact that five Commissioners returned the memorandum without objection, the staff recommendation was adopted by "majority vote" within the meaning of section 437c(c). Nothing in that provision forbids the Commissioners from voting, as they did here, by means of memoranda.

whether the candidate in fact has met the fundraising threshold.

In rejecting La Rouche's application, the Commission relied on the results of the field interviews of CTEL contributors in Delaware, Massachusetts, and Wisconsin. Those interviews indicated that, in both Delaware and Wisconsin, La Rouche had failed to raise the requisite amount. In Delaware, where the initial audit indicated that La Rouche had exceeded the $5,000 threshold by only $36.75, the field interviews revealed that $420 of that total had been contributed from funds not belonging to the listed contributors. Such funds obviously are not "contributions" within the meaning of the Act, *see* 26 U.S.C. § 9034(a) (1976), for to hold otherwise would render meaningless the requirement of section 9033(b)(4) that only $250 per person be counted toward the threshold amount. In Wisconsin, where the initial audit indicated that La Rouche had exceeded the fundraising threshold by only $172.62, one listed contributor denied altogether having made a $250 contribution and two others confirmed only a portion ($125) of their reported contributions ($365). Thus, inasmuch as La Rouche plainly fell short of the threshold amount in at least two of the twenty states involved,[23] we conclude

[23] Although we hold today in No. 77-2093 that the agents of the Commission may have exceeded their statutory authority during the field interviews in asking certain questions regarding the contributors' political beliefs and may even have violated the fourth amendment in procuring financial documents and bank records from one contributor in particular, Jones v. Federal Election Commission, No. 77-2093, slip op. at 30-34, (D.C. Cir. August 23, 1979), we do not believe that our holding in No. 77-2093 renders suspect the reliability of the results of the field interviews. Nor in fact do petitioners have directly dispute the results of the field interviews. Accordingly, in the instant case, we rely on those results in affirming the Commission's refusal to certify La Rouche's eligibility to receive matching funds.

that the Commission did not err in refusing to certify La Rouche's eligibility to receive matching funds on the ground that he failed to satisfy the fundraising threshold of section 9033(b)(3)-(4).[24]

[24] Petitioners also argue that they have been denied equal protection under the fifth amendment, insofar as the Commission singled out La Rouche for different and unusual treatment in rejecting his application for primary matching funds. The short answer to this argument is that the record reveals that La Rouche's application for matching funds was the only application during the 1976 election that raised any substantial question as to whether the fundraising threshold had been met. In the absence of any evidence of a pattern of harassment or bad faith on the part of the Commission, we see no basis for finding an equal protection violation simply because the Commission accorded unique treatment to a unique application.

Nor is this "[a] statutory scheme that blocks minority party access to the electoral process [and thereby] unjustifiably invades the right to vote and to associate." *Doe v. Martin*, 404 F. Supp. 753, 759-60 (D.D.C. 1975) (three-judge court) (footnote omitted). As the Supreme Court in *Buckley v. Valeo* noted:

> Subtitle H [which includes the Act] does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions. Any disadvantage suffered by operation of the eligibility formulae under Subtitle H is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates. But eligible candidates suffer a countervailing denial. As we more fully develop later, acceptance of public financing entails voluntary acceptance of an expenditure ceiling. Non-eligible candidates are not subject to that limitation. Accordingly, we conclude that public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases. In any event, Congress enacted Sub-

IV

It is our view, in sum, that Congress intended to create a certification mechanism designed to ensure both that frivolous candidates are denied primary matching funds and that eligible candidates are paid such funds promptly. Our construction of section 9033(b)(3)-(4) and section 9036(a) reflects these two policies. The first policy is served by our holding that a candidate seeking to establish his eligibility under section 9033(b)(3)-(4) must satisfy the Commission that he has the requisite documentation to establish his compliance with the fundraising threshold. The second policy is served by our holding that the Commission, in passing on the eligibility of a candidate, must restrict its inquiry under section 9036(a) to the face of the candidate's threshold submission except where that submission (or that submission together with other documents on file with the Commission) contains patent irregularities suggesting the possibility of fraud.

There is no question but that, under the legal standards outlined above, the Commission, in October 1976, acted properly in not approving La Rouche's application for matching funds, inasmuch as his threshold submissions fell far short of the documentation required to establish his eligibility. The proper course of action at this juncture would have been to await the submission of additional documentation. Instead, the Commission, absent the requisite finding of patent irregularities on the face of the initial submissions, chose to conduct an audit

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title H in furtherance of sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate.

424 U.S. at 94-96 (footnotes omitted). For the same reasons, we find no constitutional infirmity in the certification procedure outlined above at least as regards La Rouche.

of CTEL's books. This error, we think, was nonprejudicial, however, because if the Commission had awaited the requisite documentation, it would have contained, as the audit revealed, patent irregularities of the sort that surely would have warranted an audit of CTEL's books. It is our view that the Commission, once confronted with these irregularities, acted both reasonably and within the scope of its statutory authority in conducting a further investigation and finally in rejecting, on the basis of that investigation, La Rouche's application for matching funds. Accordingly, we affirm the decision under review.

It is so ordered.

[Logo of the Federal Election Commission]

October 21, 1976

Mr. Lyndon H. LaRouche, Jr.
Committee to Elect Lyndon LaRouche
P.O. Box 1972, GPO
New York, New York 10001

Dear Mr. LaRouche:

This letter is in response to your certification to the Commission for eligibility for Presidential Primary Matching Funding. Prior to conducting an audit of your threshold submission, the Commission raises several preliminary questions.

The Presidential Primary Matching Funding is provided to candidates seeking Presidential nomination for a political party in primary elections. Primary election is defined in 26 U.S.C. Section 9032(7) to mean:

> . . . an election, including a runoff election or a nominating convention or caucus held by a political party, for the selection of delegates to a national nominating convention of a political party, or for the expression of a preference for the nomination of persons for election to the office of President of the United States.

The limitation of the public funding to candidates running in party primaries was upheld by the Supreme Court in *Buckley v Valeo*, 424 U.S. 1 (1976). Accordingly, we request your submission of a listing of all party primaries in which you were a candidate for the nomination of the U.S. Labor Party for the 1976 election.

An additional question concerns the determination of your matching payment. This term is defined in 26 U.S.C. Section 9032(6) to mean:

> . . . the period beginning with the beginning of the calendar year in which a general election for the

> office of President of the United States will be held and ending on the date on which the national convention of the party whose nomination a candidate seeks nominates its candidate for the office of President of the United States, or, in the case of a party which does not make such nomination by national convention, ending on the earlier of—
>
> (A) the date such party nominates its candidate for the office of President of the United States; or
>
> (B) the last day of the last national convention held by a major party during such calendar year.

To assist the Commission in determining the matching payment period, we would appreciate your providing answers to the following questions:

(1) Are you listed on any State ballots for the 1976 election as the Presidential nominee of the U.S. Labor Party? If so, what was the date of your qualification for that ballot?

(2) Does the U.S. Labor Party have a national convention at which its candidate for the office of President is nominated? If so, what was the date of the national convention for the 1976 election?

(3) If the U.S. Labor Party does not nominate its candidate at a national convention, the date the party nominated its candidate for the 1976 election and the method used to nominate.

We appreciate your assistance in this matter, an early response will facilitate the Commission in processing your certification request.

Sincerely yours,

/s/John G. Murphy, Jr.
JOHN G. MURPHY, Jr.
General Counsel

cc: Robert Case Liotta, Esq.
1619 New Hampshire Ave., N.W.
Washington, D.C. 20009

LIOTTA, MASTER & BUFFONE
Law Associates
1619 New Hampshire Avenue, N.W.
Washington, D.C. 20009

John G. Murphy, Esquire
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C.

Re: Application of Lyndon LaRouche,
candidate of U.S. Labor Party
for Presidential Primary Matching Funds

Dear Mr. Murphy:

We have been recently retained to represent Mr. LaRouche in his application for Presidential Primary Matching Funds.

It is our understanding that official written application and appropriate documentation was submitted to you on October 15, 1976.

On October 21, 1976 a letter was sent to Mr. LaRouche raising certain questions to which you desired answers prior to completing processing of the application. We herein undertake to answer these questions.

You raise the question of whether Mr. LaRouche actually took part in a "primary election" as that term is defined in 26 U.S.C. Section 9032(7). Our interpretation of this section is that a qualified "primary election" can be either of two things: (1) an actual election or (2) "a nominating convention or caucus . . . ," held for one of two purposes.

Mr. LaRouche, in nearly all the states in which he is now on the ballot, did not take part in "an election" but he did take part in a "nominating convention or caucus." As we interpret this section, the "nominating convention

or caucus" qualifies if it is for either of two purposes: (1) "for the selection of delegates to a national nominating convention" or (2) "for the expression of a preference for the nomination of persons for election."

Mr. LaRouche campaigned for his nomination as the candidate of the U.S. Labor Party (hereinafter referred to as U.S.L.P.) in all states where the U.S.L.P. had an organization which would place a candidate on the ballot. He campaigned to convince the local party organizations that he was the most viable candidate to represent the U.S.L.P.

Each state organization held conventions or caucuses wherein Mr. LaRouche was selected as the candidate to be nominated at the national nominating convention. It is difficult to specifically characterize this selection process as either (1) the selection of delegates or (2) "the expression of a preference" because there were in fact "delegates" to the national nominating convention but the selection of these delegates was done by the local party organization. The local party in most cases elected a Chairman who in turn was the "delegate" to the national nominating convention. Twenty-one of these "delegates" appointed a proxy to attend the convention to cast their vote for Mr. LaRouche and ten "delegates" attended in person to cast their votes. This process might better be characterized as the holding of a "caucus" for the "expression of a preference." In either case, however, Mr. LaRouche has clearly complied with the letter and the spirit of the law.

It is interesting to note that the proposed Rules and Regulations of the Federal Elections Commission, Federal Register, Vol. 41, No. 166 in Subchapter C, Section 130.7 adds an additional means by which a convention or caucus may qualify. It sets forth the two alternatives in the act but in Section 130.7(d) it states that additionally it may be

> "a nominating convention or a caucus held by a political party—

"(d) To nominate a candidate for election to the office of the President of the United States."

This paragraph seems to add a third option for qualifying a "nominating convention or caucus." Under the proposed rules a caucus which neither chose delegates or expressed a preference would qualify if it made a direct nomination of the candidate.

Considering the difficulty involved in defining exactly what a candidate must do, together with the newness of the legislation and its apparent lack of sensitivity to the fact that new and smaller parties may use slightly different methods of nominating and choosing their candidate, it is submitted that Mr. LaRouche has complied as well as possible.

Assuming that the Commission accepts the argument that delegates were validly chosen, Mr. LaRouche has then definitely qualified by conducting a national nominating convention in which persons holding proxies from each of the "delegates" cast their votes for Mr. LaRouche. The national nominating convention was open to the nominations of other slates but none were made. The national nominating convention was held in New York City on October 16, 1976. (See attached Exhibits A and B).

Additionally, you have requested three pieces of information which are supplied below:

(1) Mr. LaRouche is listed on the ballot in the following states:

Indiana—	September 1, 1976
Virginia—	September 5, 1976
Iowa—	August 31, 1976
Vermont—	September 15, 1976
New Hampshire—	September 22, 1976
Tennessee—	September 1, 1976
Minnesota—	September 14, 1976
Washington—	September 14, 1976
North Dakota—	September 23, 1976—

Wisconsin—	July, 1976
New York—	September 5, 1976
Washington, D.C.—	August 15, 1976
Florida—	status pending court decision
North Carolina—	U.S.L.P. has permanent ballot status
Delaware—	July, 1976
Ohio—	March 31, 1976
Kentucky—	March 31, 1976
New Jersey—	April 19, 1976
Michigan—	September, 1976
Idaho—	May 30, 1976
Mississippi—	June 29, 1976
Illinois—	July 15, 1976
Pennsylvania—	August 15, 1976
Colorado—	August 15, 1976
Connecticut—	August 23, 1976

(2) As stated above the U.S. Labor Party did have a national convention on October 16, 1976.

(3) As stated above the U.S. Labor Party officially nominated Lyndon LaRouche as its candidate at its national convention on October 16, 1976. The method of nomination was by delegates from the states. (See Exhibits A and B).

In conclusion we submit that Mr. LaRouche has complied with all the provisions of the Presidential Primary Matching Payment Account Act, and that his application for Funds should be granted.

Sincerely,

Robert Case Liotta

Commission Memo No. 1033

[Logo of the Federal Election Commission]

November 2, 1976

MEMORANDUM

TO: The Commission

THROUGH: Lan Potter

FROM: Jack Murphy

Attached find a memorandum regarding the status of the application for primary matching money by Lyndon LaRouche, the presidential candidate for the U.S. Labor Party. Continuing contacts with his representatives for purposes of assuring that the factual picture is clear have delayed submission of this report to the Commission. I do think the matter should be taken up by the Commission as quickly as possible now, and accordingly request that it be placed on the agenda for Thursday, November 4, 1976.

Attachment

AGENDA ITEM
For Meeting of: 11-4-76
Agenda Item No: II
Exhibit No: II

[Logo of the Federal Election Commission]

November 2, 1976

MEMORANDUM

TO: The Commission

THROUGH: Lan Potter

FROM: Jack Murphy,
Dan Swillinger

SUBJECT: Application of Lyndon LaRouche for Presidential Primary Matching Funds

1. *Background*

On October 14, 1976 the Commission received a hand delivered, notarized certification pursuant to 26 U.S.C. Section 9033 from Lyndon H. LaRouche, Jr., who stated he is seeking the nomination of the U.S. Labor Party for election to the Office of President. The certification stated that Mr. LaRouche had met the requirements set forth in Section 9033(b) and it also contained the agreements required in 9033(a). Over the course of the next week, discussions were had between Commission staff and representatives of Mr. LaRouche's committee regarding the general requirements for certification for eligibility. On October 21, 1976, we directed a letter to Mr. LaRouche requesting additional information on the method by which he was nominated. A response to that letter was received on October 23, signed by Mr. Robert C. Liotta, counsel for Mr. LaRouche. Further telephone communication between Commission staff and Mr. Liotta occurred on October 26, and on October 27, Mr. David Heller delivered to the Commission on behalf of Mr. LaRouche a computer printout purporting to list all contributors to Mr. LaRoe from October 1, 1975 through October 25, 1976. During the course of the meeting with Mr. Heller,

attended by Drew McKay, Joe Stoltz and Dan Swillinger, it was indicated to Mr. Heller that the matter would likely be placed on the Commission's agenda for November 4, and, assuming the Commission approved going forward with the field audit, that audit would likely take place the beginning of the week following the Commission's consideration of the matter. On October 28, the Commission was served with formal notification and a copy of the complaint, which Mr. LaRouche filed in the U.S. District Court for the District of Columbia seeking a temporary restraining order to compel the Commission to consider the question of certification for matching funds. On October 29, Judge Corcoran denied the request for the restraining order.

2. *Issues before the Commission*

There are three basic issues which the Commission must consider in determining whether Mr. LaRouche has met the threshold requirements:

(a) Was Mr. LaRouche a candidate for nomination of a political party?

(b) Has he satisfactorily complied with the Title 2 reporting requirements?

(c) Has he raised the requisite $5,000 in 20 states in amounts of $250 or less?

(a) Mr. LaRouche was nominated as the Presidential candidate of the U.S. Labor Party at a national nominating convention on October 16, 1976. He received the unanimous vote of delegates from 30 states and the District of Columbia. According to letters and affidavits received by the Commission, Mr. LaRouche received the nomination after securing the support of the U.S. Labor Party caucus in each state. Beginning early in 1976, Mr. LaRouche sought the endorsement of the Labor Party caucus in each of the 31 jurisdictions. For the Labor Party, a state caucus is the equivalent of a primary election or convention. After a State caucus endorsed Mr. LaRouche, it would proceed to gather the requisite signatures to place Mr. LaRouche on the general election

ballot as the Labor Party candidate in that state. This petition process is necessary in all but two states (North Carolina and Idaho), in which the Labor Party has permanent ballot status, and in one state (Washington) in which a party convention was held. Following completion of the petitioning process, the Labor Party held its convention in New York City, at which Mr. LaRouche and Wayne Evans were nominated as the Presidential and Vice-Presidential candidates.

Assuming the caucus process described above is verifiable, the Office of General Counsel believes that Mr. LaRouche, through October 16, was a candidate for nomination of a political party and therefore meets the requirements of 26 U.S.C. Section 9033(b)(2) and Section 131.2(a) of the Commission's proposed regulations.

(b) Since early in 1976, the Committee to Elect Lyndon LaRouche has withheld the identification, occupation, and principal place of business of over $100 contributors. At the meeting with Commission staff on October 27, Mr. Heller stated that the LaRouche committee intends to file an amendment to its reports to bring them within full compliance of Title 2 requirements. The computer printout showing all contributions received includes the listing of over $100 contributors with the requisite additional information.

It is the recommendation of the Office of the General Counsel that if the LaRouche committee does file the appropriate amendment, and all other required reports have been filed, the Commission should determine that, for purposes of qualification for matching funds, the LaRouche committee is in substantial compliance with Title 2 reporting requirements as required by Section 131.1(a)(4).

(c) During the fall of 1975 and the winter of 1976 when the Commission was determining the eligibility of other Presidential candidates, there was no case in which there was a question of whether the $100,000 threshold amount had been raised. In most cases, the normal Title 2 reports indicated that well in excess of that amount had been

raised. At the time the application letter from Mr. LaRouche was received, his committee had not filed the October 10 report, and reports on hand indicated that substantially less than $100,000 had been raised by his committee. The October 10 report, received on October 26, indicated that between January 1, 1975 and September 30, 1976, the LaRouche committee had raised approximately $75,000. The computer printout showing all contributions by the LaRouche committee between October 1, 1975 and October 25, 1976 indicated that he had raised over $5,000 in at least 20 states.

However, that printout raises an additional question. A preliminary review of the printout indicates that if all contributions received after October 16, 1976, Mr. LaRouche's date of ineligibility, are excluded from the contributions to determine eligibility, Mr. LaRouche will not meet the threshold $5,000 requirement in at least seven states. Neither the statute nor the regulations specifically denote the cutoff date for contributions to meet the threshold requirement. Section 130.8(a)(3) provides that contributions may be matchable if received and deposited no later than December 31, 1976. Based on that provision, it could be argued that contributions to determine eligibility could be made and counted through the same date. Conversely, it also could be argued that for eligibility purposes, the end of the matching period (the date of nomination) is the appropriate cutoff date for contributions to determine eligibility, since a candidate presumably will not be raising funds for the purpose of influencing his nomination after that date. The Commission has consistently held, as reflected in Section 110.1(a)(2) that contributions made before the date of a primary election or nominating convention are presumed to be made for the primary, and contributions made after that date are presumed to be for the general election. In the context of Title 26, such post primary contributions are presumptively not "made for the purpose of influencing the result of a primary election." 26 U.S.C. Section 9032(4)(A). It is the clear Congressional intent that the

threshold requirement is a standard to determine the viability and national appeal of a candidate. It is our judgment that Congressional intent would be contradicted if a candidate's eligibility is determined by contributions after he is no longer a candidate for nomination.

3. *Recommendation*

It is the recommendation of the General Counsel's Office that contributions received after October 16 not be counted for the purpose of determining whether a candidate meets the fundraising threshold. The Counsel's Office further recommends that a field audit not be undertaken to determine whether Mr. LaRouche has met the eligibility requirements, since information on hand does not indicate that the threshold has been met, the requisite for prior field audits.

[Logo of the Federal Election Commission]

December 27, 1976

MEMORANDUM

TO: THE COMMISSION

THROUGH: John G. Murphy, Jr.
Orlando B. Potter
Gordon Andrew McKay

FROM: Joe Stoltz
Charles N. Steele

SUBJECT: Recommendation to Expand Audit of Committee to Elect Lyndon LaRouche to include Related Organization

At its meeting of November 4, 1976, the Commission approved a matching fund threshold audit of the Committee to Elect Lyndon LaRouche.

At the present time the Committee to Elect Lyndon LaRouche (CTEL) has reached the required threshold in 18 states and has collected in excess of $5,000 in 2 others. The Committee is currently obtaining the required documentation in these two states. The short fall is $69.00 in Connecticut and $195.00 in Indiana. It is the staff's belief that the requisite documentation will be submitted within a few days. If so, sometime in early January the submission will be ready for presentation to the Commission, with evidence pertaining to CTEL's nomination and primary processes.

At the same time, the staff intends to continue its audit work and feels it would be helpful to expand it to include

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Due to extenuating circumstances this fails to meet the requirement for circulation and a waiver of the rules is requested.

examination of records of organizations associated with CTEL. We believe this because the Committee to Elect Lyndon LaRouche occupies space and has common personnel with four other organizations (see Attachment 1). These four organizations also account for the majority of CTEL's expenditures and debt (see Attachment 2). During review of the Committee's itemized contributions exceeding $100, it was noticed that a number of contributors had a common occupation, that of Volunteer Organizer for the National Caucus of Labor Committees (NCLC). The NCLC is an unregistered committee, which made in-kind contributions of $6,250.00 to CTEL, and which has no salaried employees. These contributions from NCLC Volunteer Organizers were scheduled and compared to the twenty states being used for threshold. Contributions from NCLC Volunteer Organizers were received in 21 states (one of which was not used for threshold); 57% of these contributions were received in the last two weeks of the eligibility period (while only 41% of the total contributions were received during the same period).

NCLC Volunteer contributions also account for 16% of the total contributions received. Moreover, the five states shown below are of the particular interest because of the percentage of the funds received that were contributed by NCLC Volunteer Organizers and the timing of those contributions.

NCLC also received payments from CTEL of $31,808.27 during the period of October 1 through Oc-

State	*Percentage of Total Contributions from NCLC Volunteer Organizers*	*Percentage of NCLC Volunteer Organizers Contributions in October*
Illinois	30.4%	82.8%
Massachusetts	27.7%	79.9%
Missouri	24.2%	42.0%
New Jersey	29.7%	43.0%
Wisconsin	52.7%	83.2%

tober 18, 1976, which accounts for 55.22% of all CTEL expenditures for that period. Further, CTEL raised 99.3% of its total contributions in 20 threshold states with only $870.00 raised in the remaining 31 states. Examination of CTEL contributor records shows the numbers of contributors made contributions of $50.00 or more in the last weeks of the eligibility period. Also included are several cases where more than one such contribution was received on the same day and/or on consecutive days from the same contributor. In many cases, the contributor's listed occupation seems unusual for fairly heavy political contributions. Although these patterns do not prove any irregularities in the Committee's contributions, the staff believes that audit work on NCLC, and confirmation of contributions with contributors to CTEL should be done before any initial payments are made. This audit work would include audit of records of the U.S. Labor Party, which raised $96,000.00 in cash for the 30-minute NBC broadcast by Mr. LaRouche on November 1, 1976, as well as Campaign Publications, Inc., and New Solidarity International Press, Inc., which, with NCLC, are CTEL's major creditors. Accordingly, the staff would like authority to continue this audit in accordance with this recommendation.

[Logo of the Federal Election Commission]

January 13, 1977

MEMORANDUM

TO: THE COMMISSIONERS

THROUGH: Orlando B. Potter
Bill Oldaker
Bob Costa

FROM: Joe Stoltz
Charlie Steele

SUBJECT: Recommendation to Confirm Contributions to the Committee to Elect Lyndon LaRouche with Contributors

During the meeting of December 29, 1976, the Commission considered the attached memorandum dated December 27, 1976. This memorandum outlined the reasons that the staff believes further audit work is needed before matching payment eligibility can be determined in the case of the Committee to Elect Lyndon LaRouche. Part of the additional work that is considered necessary is the confirmation of contributions with contributors. The staff would propose to begin this process simultaneously with the commencement of the additional work at Committee headquarters. The staff further proposes to accomplish this confirmation via personal interviews. The personal interview method was chosen because of the patterns of contributions outlined in the December 27th memorandum and patterns of cash contributions developed since that time.

If no objection is raised within 24 hours, the staff will proceed as outlined above.

LIOTTA, MASTER & BUFFONE
Law Associates
1619 New Hampshire Avenue, N.W.
Washington, D.C. 20009

February 3, 1977

Mr. Charles Steele, Esquire
Federal Elections Commission
1325 K Street, Northwest
Washington, D.C. 20463

Re: Committee to Elect LaRouche

Dear Mr. Steele:

This letter will confirm our conversations and understandings of the past week or so.

On January 26, 1977, I wrote to you giving our begrudging consent to the Federal Elections Commission (FEC) for individual personal verifications of contributions to the Committee to Elect LaRouche (CTEL). I also explained our position with regard to auditing the "related" organizations listed in your letter of January 21, 1977.

As you know, my client called me the following day with a list of horror stories about early morning visits by your teams of investigators and intimidation of CTEL contributors including blatant allegations of fraudulent contributions and veiled threats of criminal prosecution. In our conversations on that date, you also informed me that many of the contributors refused to talk to your investigators. As I explained then, it is quite understandable that when people are confronted in their homes or places of business by Federal agents questioning them about contributions to a radical minority political party, that they would be reluctant to give any information—especially in light of the recent exposure of the injustices

and abuses heaped upon members of other minority parties in this country in the past ten years.

You also informed me that you still had a problem with the threshold question of $5,000 in contributions in twenty (20) states because a verification submitted for Mr. Joseph P. McDonough from Connecticut was duplicative of a previous verification and did not increase the verified amount over the $5,000 figure. It is my understanding that on February 2, 1977 Mr. McDonough came to your office and presented money order receipts and a signed statement. As a result, you should have verification for the following amounts from Mr. McDonough:

(1) 3/10/76—$10
(2) 7/26/76/— $3
(3) 9/22/76—$50—cash
(4) 10/12/76—$78—money order receipt
(5) 10/14/76—$37—money order receipt
(6) 10/15/76—$40—cash—voucher provided

In addition I understand that Mr. McDonough mistakenly submitted a money order receipt for $42.50 dated October 19, 1976 which is obviously not includable as it is beyond the cut-off date of October 16, 1976. Regardless, I believe this should adequately meet the requirement you imposed for individual verification of contributions by check, money order, or written statement.

We now expect and request that the Commission take immediate action on our application.

Sincerely,

Robert Case Liotta

cc: Ms. Marcia Pepper
Joel Joseph, Esquire

LIOTTA, MASTER & BUFFONE
Law Associates
1619 New Hampshire Avenue, N.W.
Washington, D.C. 20009

February 8, 1977

Charles Steele, Esquire
Federal Elections Commission
1325 K Street, Northwest
Washington, D.C. 20005

Re: Committee to Elect LaRouche

Dear Mr. Steele:

I would like to confirm two items that I believe we agreed upon earlier.

On February 2, 1977, the Commission received the written statement of Mr. McDonough verifying his contributions to the Committee to Elect LaRouche (CTEL). In our conversations on that date you stated that you believed this action would satisfy the Commission's request for written verifications in lieu of checks or money orders, of contributions for the state of Connecticut. Connecticut was the one state of the twenty submitted where the $5,000 contribution had not been verified as requested.

I understand of course that the Commission has requested and is requesting further verification of these same contributions by way of personal interviews with contributors. As you know, it is our position that Section 9033 does not require these extreme measures, but we will not oppose it if it is carried out without intimidation and with advance notice to potential interviewees. I have instructed my client to notify any contributors who call the New York office of the United States Labor Party that they should speak with Federal Elections Commission (FEC) investigators if they want to.

Finally, I just want to make clear what I told you on February 2, and 7, 1977 regarding our intention to file suit pursuant to Section 9041. It is our position that on February 2, 1977 we established our eligibility under Section 9033 in accordance with FEC "policy" and that pursuant to Section 9035 the Commission is obligated to certify our eligibility for payment to the Secretary of the Treasury within ten (10) days. Therefore, if our application is not acted upon by February 14, 1977, we will file our petition for review.

It is our position that Section 9033 does not specify in what manner a candidate must demonstrate his eligibility—it merely states that "a candidate shall certify to the Commission that, (3) the candidate has received matching contributions which in aggregate exceed $5,000 in contributions from residents of at least 20 states . . ." Many months ago, my client "certified" that he had met this condition and then voluntarily complied with the Commission's "policy" that the contributions had to be verifiable by checks, money orders or written statements of contributors. Our agreement to provide these documents led to months of delay in processing our application. We have now complied with that policy and are requesting action pursuant to Section 9036.

Sincerely,

Robert Case Liotta

cc: Ms. Marcia Pepper
Joel Joseph, Esquire

[Logo of the Federal Election Commission]

February 10, 1977

Report of the Compliance Review Section
Office of Compliance
Federal Election Commission
On
Committee to Elect Lyndon LaRouche

I. *Background*

As directed by the Commission, an audit was conducted of the Committee to Elect Lyndon LaRouche pursuant to Section 438(a)(8) of Title 2 of the United States Code (2 U.S.C. 438(a)(8)). This report only addresses whether the candidate has satisifed the provisions of Section 9033(b)(3) and (4) of Title 26 of the United States Code (26 U.S.C. 9033(b)(3) and (4)). Other eligibility requirements as stated in 26 U.S.C. 9033 are not addressed in this report.

The Compliance Review Section examined the reports and records of the Committee to Elect Lyndon LaRouche was a 14-month period ending October 18, 1976. Our examination was made in accordance with generally accepted auditing standards, including appropriate tests of accounting records and other auditing procedures necessary under the circumstances.

The findings and conclusions contained in this report are rendered on the basis of the audit performed and definition of contribution under 26 U.S.C. 9034, as amplified by Section 130.8 and 131.1 of the Commission's Proposed Regulations governing eligibility, the Guideline for Presentation in Good Order, and upon advice and guidance provided by the Commission's Office of General Counsel.

II. *Findings and Conclusions*

On January 14, 1977 the Commission approved the direct contacting of contributors to verify contributions in three states: Delaware, Massachusetts, and Wisconsin.

Based on the results of these confirmations, outlined in the attached chart, the Committee to Elect LaRouche has not satisifed the provisions of Section 9033(b)(3) and (4) of Title 26 of the United States Code (26 U.S.C. 9033 (b)(3) and (4)) requiring the receipt of an excess of $5,000 in matchable contributions in amounts of $250 or less in each of twenty states.

March 2, 1977

Mr. Charles Steele, Esquire
Federal Election Commission
1325 K Street, N.W.
Washington, D.C.

Re: Committee to Elect Lyndon LaRouche

Dear Mr. Steele:

Enclosed please find copies of two affidavits which back up the allegations in my recent letters regarding intimidation by FEC investigators who were supposed to be verifying contributions which were "certified" to the Commission.

It is our position that these affidavits cast a cloud over your reliance on the results of this investigation in denying the application for matching funds. As I stated in earlier correspondence, it seems incredible to deny the application on the grounds that contributors did not cooperate with your investigators when tactics such as those documented in the affidavits were used.

On the matter of the three letters captioned, MUR 281, MUR 328, and MUR 368, I have just reached a tentative agreement with Biz Van Gelder, of your office, to the effect that she was reviewing the files and would send out one letter, clarifying and consolidating the response which the FEC expected in these matters. I will thus await this letter before responding on behalf of my client on all three matters.

Sincerely,

Robert Case Liotta

Enclosures

cc: Joel Joseph, Esquire
Ms. Marcia Pepper

RCL:3/2/77:cew

AFFIDAVIT OF LEROY JONES

COUNTY OF NEW YORK:
STATE OF NEW YORK:

I, LEROY JONES, do hereby swear and depose that the following is true.

1. I reside at 4 Brandywine Blvd. in Wilmington, and have lived there for 23 years.

2. I am a member of the U.S. Labor Party and a contributor to the Committee to Elect LaRouche in 1976.

3. At 7:45 on the morning of January 26, 1977 my wife answered a knock on our front door with two men at the door indicating to her that they were from the Federal Election Commission.

4. My wife told me that they asked if a Robin Kieffer or Chris Douglas were there, to which she replied that they weren't.

5. My wife then woke me up and told me who was there and that they wanted to speak to me.

6. I went to the door and one of the men showed identification to the effect that he was from the Federal Election Commission, and that his name was Keith Vance.

7. Mr. Vance asked me how much money I gave to the Committee to Elect LaRouche, and where I got the money from.

8. I answered these questions to the best of my knowledge.

9. Mr. Vance asked to see my canceled checks and asked what date I had written the check.

10. I answered that I didn't think I had either bit of information on hand immediately at which point he did say to me: If you don't give me the exact information I asked for you could get sentenced up to 10 years in jail and be given a $10,000 fine . . . you've got a nice house here, you wouldn't want to lose it would you?

11. He said this in an extremely threatening tone, at which point I went upstairs and searched with my wife for 1/2 hour looking for receipts. I showed Mr. Vance

my tax returns and a canceled check from a contribution made to the CTEL in December.

12. Mr. Vance asked me if I made all contributions by check, and wanted to know the banks the checks were drawn on.

13. I answered these questions to the best of my ablity.

14. Mr. Vance then began asking numerous questions as to my political affiliations and beliefs.

15. He demanded to know where a Robin Kieffer and Chris Douglas were living, and the exact dates that they lived at my house.

16. I answered these questions to the best of my ability indicating where further information could be gotten about these matters.

17. Mr. Vance then began asking numerous questions as to how the Labor Party raises its money, who its contributors are, etc. all of which I answered to the best of my ability.

18. Mr. Vance then asked me for all my personal bank account numbers and all Labor Party bank account numbers and demanded that we sign statements permitting them to inspect my bank accounts, threatening me with the same reprisals should I refuse.

19. In great fear I signed the statements, and received no copy or receipt.

20. Mr. Vance then renewed questioning asking what activities I had engaged in with the party and who paid my expenses. These questions were detailed and very personal.

21. Mr. Vance then turned to my wife and gave her his business card and told her: If you want to change your story, just get in touch with him at the number listed on the card.

22. They left at 9:15 AM.

23. Both my wife and myself felt thoroughly intimidated and in fear of loss of security and property were we not to comply with Mr. Vance's questions. At no point was I informed of my rights or as to the nature and purpose of the interrogation.

24. I contacted the Labor Party headquarters after the interrogation and informed them of what had happened.

25. Because of the great tension experienced on this occasion I had to make an extraordinary visit to my doctor on Tuesday, Feb. 2nd. He took an electro-cardiogram for precaution after I had told him of the incident and changed the prescription of the medicine. I have a heart condition and have experienced over 1 dozen heart attacks over the past period. I am 59 years old, and retired because of my medical condition.

/s/Leroy B. Jones
LEROY B. JONES

Sworn to before me this
2nd day of February, 1977
MARIE MENDEZ
Notary Public State of New York
No. 314020518

AFFIDAVIT of WILLIAM TOPPIN

January 28, 1977

I, WILLIAM TOPPIN, do hereby swear that the following is true.

1. I live at 103 Chesterfield Road, New Castle, Delaware.

2. On Wednesday, January 26, 1977, at about 10:30 A.M., two men appeared at the door of my home.

3. They claimed they were from the Federal Election Commission.

4. They came into my house, showed me identification, and said they wanted to ask me some questions.

5. One of the agents was named Vance. I do not recall the other agent's name.

6. They told me I might have to go to Washington, D.C. to testify in Federal Election Commission hearings there.

7. They asked me questions in minute detail about how much and by what means I contributed money to the Committee to Elect Lyndon LaRouche during the 1976 presidential campaign.

8. They also continually questioned me about how much money I have given to the U.S. Labor Party.

9. They wanted to know how much money I gave to the Committee to Elect Lyndon LaRouche, how I gave it, who I gave it to, if it was by personal check or cashier's check, etc.

10. They demanded to know if I was buying the house I was living in, or if I was just renting it.

11. They demanded to know if I was a member of the National Caucus of Labor Committees.

12. They demanded to know if I organized with the U.S. Labor Party.

13. They demanded to know what people did when they organized with the U.S. Labor Party.

14. They demanded to know if I shared the Labor Party's beliefs.

15. They demanded to know the whereabouts of other U.S. Labor Party members in Delaware.

16. I was intimidated by their questioning because they were belligerent, and because throughout the interrogation the agents were continually misquoting statements I had previously made, and trying to get me to agree to their reformulation and distortion of my previous statements.

17. The agents compelled me to draw up a statement about my contributions to the U.S. Labor Party and the Committee to Elect Lyndon LaRouche and sign it.

/s/William H. Toppin
WILLIAM TOPPIN

Sworn to and subscribed before me
this 28th day of January, 1977
/s/Richard P. McNamee
NOTARY

RICHARD P. McNAMEE
Notary Public, Philadelphia
Co.
My Commission Expires
February 21, 1980